(1) Supreme Court, U.S.
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No. _____

In The
SUPREME COURT of the UNITED STATES

MICHAEL MOORE,
Petitioner,

v.

LUIS A. MOLINA, II; and
THE CITY OF EAST CHICAGO, INDIANA,
Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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7 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether unlawful conduct under Indiana law that violates a citizen's constitutional rights, shows good cause for the purpose of setting aside a default judgment.
2. Whether state law should be applied for the purpose of determining the commencement of the chronological length of the limitation period, (i.e. the accrual period), for application of the Indiana statute of limitations to section 1983 claims.
3. Whether police have authority to intervene in the process of a federal cause of action, to execute service by hand delivering a letter for notice of deposition and a letter with reference to a pre-trial order.
4. Whether the defense of qualified immunity should be decided prior to selecting a jury for trial.

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PETITION FOR WRIT OF CERTIORARI

Comes now petitioner, Michael Moore, pro se, and petitions this Honorable Court, the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF THE BASIS FOR JURISDICTION

This petition for a writ of certiorari arises from an unpublished Order of the United States Court Appeals for the Seventh Circuit decided on May 17, 1999, (Petition for Rehearing denied August 30, 1999), affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, dismissing the petitioner's section § 1983 Civil Rights claims for want of prosecution filed against the defendants Luis A. Molina II, and the City of East Chicago, a municipal corporation of the State of Indiana.

The petitioner believes that the Constitution [1] of the United States, Article III, Sections 1 and 2 is the basis for the Supreme Court's jurisdiction, which provides in material part the following:

Article III. Section I. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . ."

Article III. Section 2. The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States; . . . . . etc."

The Civil Rights Act of 1871, Revised Statute § 1979, by definition is a Law of the United States, within the meaning and definition of the term, Law of the United States, as set forth under Article III., Section 2., of the Constitution of the United States. Section 1979 came onto the books a § 1 of the Ku Klux Act of April 20, 1871, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other purposes." 17 Stat. 13. It became with insignificant rephrasing, § 1979 of the Revised Statutes, as now set forth in 42 USC § 1983 (42 USCS 1983).

In addition, the petitioner believes that 28 USC § 1254 confers jurisdiction on the Supreme Court, which provides for Supreme Court re-

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1. Mr. *Chief Justice* Marshall stated in *Cohens* v. *Virginia*, 19 US 264, 5 L Ed 257, 6 Wheat 284, (1821), the following: "The constitution gave to every person having a claim upon a state, a right to submit his case to the court of the nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our constitution thought it necessary, for the purposes of justice, to provide a tribunal as superior to influence as possible, in which that claim might be decided." *Id.*, at 286

"The constitution gives the Supreme Court original jurisdiction in certain enumerated Cases and gives it appellate jurisdiction in all others.

Among those in which jurisdiction must be exercised in the appellate form are cases arising under the constitution and laws of the United States" *Id.*, at 288

"The constitution defines the jurisdiction of the Supreme Court . . . . .etc." *Id.*, at 289

view of cases in the United States Courts of Appeals: "(1) By writ of certiorari upon petition of any party to any civil case after rendition of judgment."

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The Constitution of the United States provides in material part the following:

1. Article VI., Clause two, provides in material part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . . shall be the supreme Law of the Land; and . . . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
2. The Fourth Amendment provides in material part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . ."
3. The Fourteenth Amendment provides in material part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

One of the statutes involved in this case, is the Civil Rights Act of 1871, Revised Statue § 1979. Section § 1979 of the Revised Statutes is now set forth in 42 USC § 1983 (42 USCS § 1983), and provides the following: "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Another statute involved in this case is Rule 55 of the Federal Rules of Civil Procedure; 28 U.S.C. Fed. Rules Civ. Proc. Rule 55 (a) (b) and (c); which provides as follows:

> 55. Default. (a) Entry When a party against whom a judgment for affirmative relief is sought has failed to plead or other wise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.
> (b) Judgment. Judgment by default may be entered as follows:
> (1) By the Clerk.. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be

made certain, the the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person. (2) By the Court. In all other cases, the party entitled to a judgment by default shall apply to the court therefor; . . . . . .etc.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and if a judgment by default has been entered may likewise set it aside in accordance with Rule 60(b)." Fed. Rule Civ. Proc. Rule 55. 28 U.S.C. Appendix.

Another statute involved in this case is Title 42 USC § 1988 (42 USCS § 1988), which provides, in relevant part: [2]

STATEMENT OF THE CASE

Federal Jurisdiction.

The basis for federal jurisdiction in the District Court, in addition to 42 USC § 1983 (42 USCS § 1983), which is set forth in the preceding paragraph above, is the following:

(1) The Act of Congress which confers jurisdiction is found in the enactment 28 USC § 1343 (28 USCS § 1343), which provides in material part: "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(2) In addition to the above, 28 USC § 1331 Subsection (a) provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum value of $10,000, exclusive of interest and cost, and arises under the Constitution, laws, or treaties of the United States."

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2. "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States and laws of the United States, shall be extended to govern the said courts in trial and disposition of the cause. . . . "

Material Facts

This petition arises from an unpublished order by the United States Court of Appeals for the Seventh Circuit decided on May 17, 1999, (Petition for Rehearing denied on August 30, 1999), affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division, dismissing the pro se plaintiff's, appellant's, and hereinafter petitioner's section § 1983 Civil Rights claims for want of prosecution filed against the defendants, appellees, and hereinafter the respondents Luis A. Molina, II, and the City of East Chicago, a municipal corporation of the State of Indiana. (Append. 3)

General

The petitioner, Michael Moore, is a non practicing attorney at law, admitted to the bar of the Supreme Court of the State of Illinois in 1976, the bar of the United States District Court for the Northern District of Illinois in 1976, and the bar of the United States Court of Appeals for the Seventh Circuit in 1976. (Depo. 11/18/97, p. 22, 23). In addition, the petitioner was Honorably Discharged, from the Army of the United States of America in 1976. (Depo. Id. p. 57, 58).

Pleadings

The petitioner commenced this action by filing a verified complaint in the District Court on August 16, 1998. (Compl. p. 1). On August 20, 1996, the petitioner served upon the respondents, true and complete copies of the verified complaint and Summons in a Civil Action by depositing the same in the United States Mail in envelopes properly addressed to each appellee with sufficient first class postage and certified mail return receipt requested affixed, from a post office in Chicago, Illinois. (Mot. Default Judg. Affd. p1; Mot. in Resp. to Set Aside Default, Affd. p. 1). On September 19, 1996 the respondents filed their answer. (Ans. p. 1). On September 27, 1996, the petitioner made an application for a judgment by default against the respondents, Molina and the City of East Chicago, Indiana. (Motion for Default Judg.). On September 27, 1996, the clerk entered a default judgment against respondent, Luis A. Molina, II, pursuant to Federal Rule of Civil Procedure 55 (a), for failure to file an answer or other pleading within the time specified in the Summons in a Civil Action. (Clerk's Entry of Default).

On October 3, 1996, the respondents filed a Motion to Set Aside Clerk's Entry of Default and Objection to Plaintiff's Motion for Default Judgment, pursuant to Rule 55 (c) of the Federal Rules of Civil Procedure, (Mot. to Set Aside Default); and a Memorandum in Support of Defendant Molina"s Motion to Set Aside Entry of Default and in Opposition to Default Judgment. (Memo. in sup. of Mot. to set aside default).

On October 16, 1996, the petitioner filed a motion to extend time for filing response with an attached affidavit which stated the following: (a) 4. That on August 20, 1996 the affiant served upon the named defendants true and complete copies of the verified complaint and Summons in a Civil Action by depositing the same in the United States Mail, in envelopes properly addressed to each and with sufficient first class postage. 5. That on August 20, 1996, the affiant served upon the above named defendants true and complete copies of the verified complaint Summons in a Civil Action by depositing the same in envelopes properly addressed to each defendant with sufficient postage, certified mail and return receipt requested affixed. (C) 6. That as of October 15, 1996 the copies of the verified complaint and Summons in a Civil Action deposited in the United Sates Mail to the above named defendants as stated in number 4 above, have not been returned to the affiant by the United States Postal Service, as not deliverable to the addressee's (i.e. the above named defendants). (Mot. to Ext. Time for Filing Resp., Affid. p. 1, 2, 10/16/96)).

On October 25, 1996, the petitioner filed a motion in response to the motion to set aside default with an attached affidavit which stated the following: (a) Id. the same facts as the preceding paragraph. (b) (9) that the appropriate date of the entry of default for each defendant should have been September 16, 1996, twenty-three days from the receipt of the first class postage, allowing three days for delivery by the United states Postal Service. (A) Allowing three days for normal delivery by the United states Postal Service, the first class copies mailed by the affiant on August 20, 1996, the date of delivery for each defendant should have been August 23, 1996. (B) Twenty-three days from the date of delivery in (A) above, (August 23, 1996), exclusive of the day of receipt of the complaint and summons in a civil action was September 15, 1996 (a Sunday), therefore Monday, September 16, 1996 was the final day to file an Answer. (c) 10. That the filed stamped date by the Law Department for the City of East Chicago, Indiana should not be weighted against the affidavit of the affiant with respect to the presumption of the date of delivery of the copies of the summons in civil action and verified complaint mailed to each defendant on August 20, 1996, by the affiant. (d) (12) That neither defendant has accounted for the copies that were mailed first class to each defendant by either admitting or denying receipt of the first class delivery by the United States Postal Service. (e) 12. That the Federal Rules of Civil Procedure provides the procedures for an extension of time to file an Answer, for which the defendants voluntary decided to ignore based upon an assumption contrary to the actual facts on file with the Court. (Mot. in Resp. to Mot. to Set Aide Default, Affid. p. 1,2,3,4, 10/25/96).

On June 24, 1997, the District Court entered an order denying the

petitioner's application for Default Judgment, and granting respondent Molina's Motion to Set Aside Clerk's Entry of Default; however , the order did specifically state: "The defendants filed their answer on September 19, 1996, several days late." (Append. p. 10). The order further stated: "To set aside an entry of default; the movant has to show that (1) it had good cause for the default; (2) it took quick action to correct the entry; and (3) it had a meritorious defense to the plaintiff's complaint. *U.S.* v. *Di Mucci*, 879 F. 2d 1488, 1495 (7th Cir.). However, because in this case the default was entered erroneously the Court will not require Molina to satisfy this test. . . . . The application for entry of default and the entry of default by the Clerk did not occur until September 27, 1996. The entry of default at that time was an error, because Molina had not failed to plead or otherwise defend as required by Federal Rule of Civil Procedure 55(a). (Append. p. 10).

On July 7, 1997 the petitioner file a motion to reconsider the order of the District Court entered on June 24,1997, that attached to the motion to reconsider order was an affidavit which stated the following: "5. The Order of the District Court in number 4 above failed to apply the standard requirements to set aside the entry of default as set forth under F.R.C.P. 55(c), and in *U.S.* v. *Di Mucci*, 879 F. 2d 1488, 1495 (7th Cir.). That defendants have failed to set forth a meritorious defense for the official acts of misconduct that form the basis for the plaintiff' claim on August 15, 1994. 7. That the defendants failed to set forth a meritorious defense for the unofficial acts of misconduct that form the basis for the plaintiff's claim on July 8, 1995. (Mot. to Recon. Ord. p. 3, 7/7/97. The motion to reconsider order was denied on an order entered on July 30, 1997. (Append. p. 8, No. 5)

Statute of limitations

On June 24, 1997, the District Court entered an order granting the respondents motion to dismiss with respect to petitioner's claims arising on August 15, 1994, as being time barred by the statute of limitations. Within the order, the District Court stated the following: "In his complaint, Moore alleges that Molina, as a police officer for the City of East Chicago, and the City of East Chicago, violated his Fourth and Fourteenth Amendment rights. Specifically, Moore alleges that Molina executed an unlawful search and seizure of Moore and incarcerated him on a false charge on August 15, 1994. (Append. p. 9). In the affidavit attached to the complaint, Moore alleges that he was subjected to an unreasonable search and seizure on the evening of August 15, 1994. As a result of the allegedly false arrest, Moore had to spend the night in jail. The next day, August 16, 1994, he was released on bond. the charges were dropped during his first appearance. Because Moore filed his complaint on August 16, 1996, Defendants argue that the plaintiff's claims are barred by the statute of limitations." (Ord. p. 3, 6/24/97,

Append. p. 11).
Compliant

On August 16, 1996, the petitioner filed a complaint, with an attached affidavit which stated the follcwing: . . . . "As we came out of the door two police cars from the East Chicago Police Department parked in front of the store and a police officer, (whom I was later to learn was defendant Luis A. Molina, II,), spoke briefly with the store manger. After speaking with the store manger he turned and ask the affiant for some identification. The affiant replied that his name was Michael Moore and that he did not have his wallet with him, at which point the defendant Molina instructed the affiant to turn around to be searched, while searching the affiant defendant went inside one of the affiant's front pockets and removed some items and said the affiant was under arrest for possession and placed handcuff's on the affiant's risk. The items removed from the affiant's front pocket were the following: (1) Five or maybe seven shinny rocks with an atomic number twenty-eight. After the handcuffs were placed on the affiant, an individual observing the police action spoke a few words for which he was promtly told by the other police officer to be quite or he could also go to jail. (Note: The police officer, who told the person to be quite or they could go to jail, had participated in an unreasonable warrantless search and seizure of the person of the affiant at the affiant's residence during the early part of the year with another police officer on a cold winter night in the early moring hours.). After placing the affiant in the back seat of the squad car officer Molina begin shouting at the affiant all the way to the police station. Upon arriving at the station defendant Molina's conduct became even more outrageous and profane. The booking officer, whom I had seen at the Lake County Fair the previous week, and had seen around town for the past 16 years at least, could not do or say anything to quite officer Molina down, so I specifically told him that the use of the profanity toward the affiant was a display of his ignorance and lack of learning or education (one of the two words), for which his immediate reply was to utter some more profanity and to lock the affiant in a jail cell with another person of African American descent." (Compl. p. 4-6). With respect to the other unnamed police officer mentioned in the previous paragraph, who had participated in warrantless search and seizure at the appellant's residence, the following facts were stated in an affidavit attached to a motion in response to a motion to set aside default: 1. That the police officer who told the person to be quite on August 15, 1994, or they could go to jail, had participated in an unreasonable search and seizure of the person of the affiant, at the affiant's residence during the early part of the year of 1994, with another younger police officer on a cold winter night in the early morning hours. 2. Sometime after midnight, but before day break in the early part of the year of 1994, the affiant was

awaken by two East Chicago police officers when they opened a door to a room in which the affiant was sleeping and pointed flash-lights and weapons at the affiant. The two police officers had entered the building on the first floor through the door left open by the affiant. 3. That previous evening the affiant had retired rather early after working in the cold in an underground area of the complex of buildings. 4. The police normally come to the complex of buildings when the alarms ring. 5. The affiant was not awaken by any alarms ringing prior to the two police officers shinning their flashlights and pointing their weapons at the affiant while the affiant was laying down. 6. Subsequent to shinning their flashlights in the affiant's eyes and pointing their weapons at the affiant, the police requested that the affiant dress and stand up against a wall to be searched. As soon as the affiant raised his arms and turned his back, one of the police officers handcuffed the affiant risks behind the affiant's back and told the affiant that he was under arrest for disorderly conduct. 7. The younger police officer went in an adjacent room looking around, and took one of the affiant's winter coats and threw the coat on the floor, for which he promptly told by the affiant, not to throw the coat on the floor, for which there was no reply except lets go. 8. Needless to say, both police officers were dressed for the weather, they had on their winter coats, hats, and gloves, however, they were escorting the affiant out of the building, without any coat, gloves or hat, into the freezing cold morning. 9. Once we reached the outside of the building the affiant could determine that it had snowed between the time the affiant had went to sleep and was awaken by the police. There was enough snow accumulation on the ground for the police to readily determine that no person could have entered the building through the door that was open for quite some period of time. The only foot prints in the snow were the foot prints of the two police officers who had entered the building through the door that the affiant had left open. 10. That both police officers had driven separate vehicles, the younger police officer escorted the affiant to the vehicle that he was driving and refused to open the rear door to allow the affiant to enter the police vehicle, even after the affiant specifically informed the younger officer that he was not paying his medical insurance and at that time the snow had turn to ice. The younger police officer looked up into the dark sky of the early morning and refused to open the door, a few minutes later the older officer, the one who told the innocent bystander who attempted to speak up when officer Molina was putting the handcuffs on the affiant to be quite in number one above, opened the door to the younger police officers squad car, and the affiant was taken to the East Chicago City Jail, and booked for disorderly conduct. 11. Later on that cold morning the affiant appeared in court and the charge of disorderly conduct was dismissed. (Mot. in Resp. to Mot. to Set Aside Default p. 6-8, 10/25/96).

Answer

On September 19, 1996, the respondents filed their answer which stated the following: (1) Defendants admit that officer Molina stopped and questioned the plaintiff while off duty, but deny the remaining allegations of subparagraph (x) of the plaintiff's Complaint. (2) Second Affirmative Defense: Plaintiff's Complaint is time barred under the applicable statute of limitations under 42 U.S.C. §1983 namely I.C. §34-1-2-2 which provides that personal injury actions must be filed within (2) years of the accrual of the claim. (3) Third Aaffirmative Defense: Officer Molina is entitled to qualified immunity from liability on the grounds that he took action based on the reasonably objective belief that his conduct was in conformance with law.

On October 3, 1996, respondent Molina filed a motion to set aside clerk's entry of default, a memorandum in support of motion to set aside default, and the declaration of Molina, which declaration stated the following: 5. On or about July 8, 1995, while off duty, I drove to an address near Railroad Avenue in East Chicago where I was approached by several local residents who recognized me as a policeman and told me that four cars had just been burglarized. A resident told me the burglaries had been committed within minutes of my arrival. 6. The resident gave me a description of the alleged burglar. The residents advised that the police station had just been called to report the incident. I then proceeded, in my car, to examine the area to see if I could find any individuals fitting the description. 7. Some blocks away, on Chicago Avenue, I encountered the plaintiff Michael Moore who fitted the description of the subject who had been seen by the resident burglarizing the automobiles. I pulled over and stopped Mr. Moore, identified myself as a police officer, explained to him that he fit the description of the person seen committing the nearby auto burglaries, and asked him to reveal the contents of a package he was carrying, and to allow me to pat down several large pockets in the coat he was wearing. Mr. Moore protested but showed me the package which contained no evidence of anything removed from an automobile such as a car radio or other electronic instrument. The pat down also revealed nothing I thanked Mr. Moore and did not detain him further. I declare and verify, pursuant to 28 U.S.C. §1746 that the foregoing is true and correct. Executed on October 3, 1996. (Decl. of Molina, p. 2, 3, 10/3/96).

Discovery

On December 30, 1996, the petitioner and the respondents appeared and participated in an initial pretrial conference before the magistrate judge, and a memorandum prepared by the magistrate judge states the following: Notwithstanding the pending Motions, the parties are to proceed with discovery in the case and fully cooperate with the other side in scheduling discovery. Plaintiff Moore will make himself

available for deposition anytime after April 1. 1997. Defendants advise that they will be submitting written interrogatories to the plaintiff for response in the near future. Plaintiff is advised that he will be required to respond to discovery requests including interrogatories, within thirty (30) days, all in accordance with the Federal Rules of Civil Procedure. . . . . The parties are recommended to submit any discovery disputes that may arise to the Magistrate for emergency hearing for expedited rulings. (Pretrial Memo. p. 2).

On or about June 5, 1997, the petitioner received respondent's notice of deposition via hand delivery by police officer Rivera of the East Chicago Police Department, while dressed in a policeman's uniform and driving a marked police vehicle of the City of East Chicago, Indiana. (Append. p. 24, 33). The respondent's notice of deposition was issued pursuant to Trial Rule 30 of the Indian Rules of Procedure. (Petit. p. 14-15; Append. p. 24, (Mot. to Grant Relief/Dismiss, Exhibit A)).

On or about October 31, 1997, the petitioner received a hand delivered letter, by detective Michael Bork of the East Chicago Police Department, from the respondents, calling the attention of the petitioner to the order of the magistrate judge and requesting a meeting with the petitioner. (Append. p. 25, 34). The Affidavit of Service by Detective Michael Bork was filed in the District Court as an exhibit in the defendant's motion to grant relief from order controlling trial or in the alternative to dismiss on November 12, 1997. (Append. p. 24)

Prior to detective Michael Bork hand delivering the letter of the respondents to petitioner, there were two other incidents with policemen from the East Chicago Police Department; one involved a shotgun, the other involved a forcible warantless entry into the petitioner's personal residence. With respect to the incident involving the shotgun: which happened durning the month of September of 1997, on a Sunday night at approximately 1:00 p. m., and either two or three weeks before the incident involving the warrantless entry into the personal residence of the appellant on October 17, 1997, (Dep. p. 84, 85); while working in the study on the Sunday evening, the automatic alarm system sounded, in which the police responded, to the front gate. (Id. p. 85). After the alarm sounded the petitioner could hear the police talking at the front gate, so the petitioner looked out the window, and one of the policemen had a shotgun pointed at the lock on the front gate, and there were three other police officers with him. (Id. p. 85). After seeing the police officer with the shotgun pointed on the lock and the other police, the petitioner opened a window and asked if they wanted the petitioner to come down and unlock the lock for them, in which they replied, yes. (Id. p. 85). After unlocking the lock with a key, and letting the officers into the front gate with a shotgun, the petitioner let them into the building complex with the shotgun so they could look around and after

looking around the building complex with a shotgun, the four officers departed. (Id. p. 85)

On Friday evening on October 17, 1997, sometime before 10:00 p.m., approximately two or three weeks after the incident with the shot gun at the front gate, the alarm sounded once again in the business down stairs from the personal residence of the petitioner, and the East Chicago police responded after the alarm had ceased. (Append. p. 33; Transc. p. 17, 11/14/97; Dep. p. 60, 68). After arriving after the alarm had sounded, one of the policemen forced open the locked door to the personal residence of the appellant, and two police officers entered the building, and proceeded to come upstairs to the living area of the petitioner, one was of Hispanic descent, the other was of African American descent (who's name is officer A. Taylor). (Id. Append. p. 34; Id. 18; Dep. 68, 69). The police were stopped before entering the study of the petitioner, were the petitioner was diligently during legal research, whereupon the petitioner asked the police officers if they had a warrant, after the second request for a warrant by the petitioner, officer A. Taylor brought his arm and hand up to about the level of his heart with a service weapon in his right hand and told the appellant, "This is my warrant!". (Id. Append. p. 34; Dep. p. 74, 75, 76). Subsequent to the officer showing and telling the petitioner that his service revolver was his warrant, the officer flash a flashlight directly in the petitioner's eyes, for which he was told by the petitioner not to flash the flashlight in the petitioner's eyes. (Id. Append. p. 34; Id. Dep. p. 77). Officer's Taylor's response to the petitioner, was to threaten to take the petitioner to jail if the petitioner didn't shut-up in his own house. (Id. Append. p. 34; Id. Dep. p. 80). Subsequent to the officer threatening to take the petitioner to jail, confirmation was received by the police officers on that state of the art wireless communication system that can send and receive voice communications within a certain radius of the person of the police officer, that the petitioner resided were the warrantless forcible entry incident was taking place.

On November 12, 1997, the respondents filed a motion to grant relief from order granting trial or in the alternative to dismiss; which included uncontroverted admissions of facts and documentary evidence with respect to use of policemen from the East Chicago Police Department to interven in the discovery process of a Civil Rights law suit filed IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA HAMMOND INDIANA, against a policemen from the East Chicago Police Department and the City of East Chicago, Indiana. (Append. p. 24; Mot. to Grt. Relief fr. Ord. Cont. Trial/Dismiss p. 1, 2). The admissions of facts are the following: "3. On or about June 5, 1997, undersigned counsel caused a letter to be delivered to plaintiff Michael Moore at his address at 1202 East Chicago Avenue, East Chicago, Indiana, by hand-delivery through

an East Chicago policeman. . . . . 7. Pursuant to this Court's order, undersigned counsel attempted to get in touch with Mr. Moore by sending him a letter, again hand delivered by a member of the East Chicago police department, Detective Bork, ... A true, accurate and complete copy of the letter and the officer's return of service is attached hereto and made a part hereof as Exhibit "C"." (Id. 25). The documentary evidence with respect to the above is the affidavit of service executed by detective Michael Bork and attached to Exhibit-C. (Id. p. 25). On November 13, 1997 the District Court entered an order to rule on the motion to grant relief from order controlling trial or in the alternative to dismiss, at the fianl pretrail conference on November 14, 1997. (Append. p. 7).

At the pretrial conference on November 14, 1997, the petitioner raised the issue in the District Court with respect to the police officers intervening in the discovery process and filed a motion for sanctions and entry of default with an attached affidavit and memorandum of law. (Trans. 11/14/97 p. 3, 4, 5, 34; (Append. p. 21); Mot. for Sanct. and Entry of Default, Memo. (Append. p. 32)). The petitioner was permitted to state for the record: that with respect to the law of the most celebrated case in the history of the United States, *McCulloch* verses *Maryland*, 17 U.S. 316, a police officer was not empowered by the Federal Rules of Discovery, to make hand delivery of the respondent's notice of deposition. (Append. p. 21; Trans. 11/14/97, p. 3,4,5). The District Court gave the respondents three days to respond to the petitioner's motion for sanctions and entry of default; ordered the petitioner to give a deposition on November 18, 1997; gave the petitioner three days to file a brief on the issue of discovery and qualified immunity; and the District Court refused to allow the petitioner state any additional case law with respect to the issue of discovery and qualified immunity; and ordered the petitioner and the respondents to complete and file the pretrial order on November 18, 1997. (Append. p. 23; Trans. p. 5-9, 11/14/97). The court did allow the petitioner to state for the record the case of *William Jefferson Clinton v. Paula Corbin*, Number 95-1853, and the fact that Paula Corbin brought a suit against the President of the United States and discovery was prohibited until the immunity question was settled; however, the court did not allow the petitioner to state for the record any other case law with respect to discovery and immunity prior to ordering the appellant to appear at the deposition on November 18, 1997. (Trans. p. 7,8, 11/14/97; Append. p. 23).

With respect to the police delivering the notice of deposition and the letter stated above the respondents stated the following: "Frankly had I known that Mr. Moore, (petitioner), had such sensitivity to the police, maybe I would have hired somebody else to deliver it. . . . .But letters don't seem to get responded to. So I asked the police officer, whose job

it is, among other things to serve process, to take it there and make a return, which was done. (Trans. p. 26, 11/14/97). The respondents further stated: ". . . . But all we are left with here is Officer Molina's stop and frisk. I think that under the state of law, there were exigent circumstances, that allowed him to make that stop, particularly if he had a description which Mr. Moore fit. Secondly, he does have a legitimate claim personally and qualified immunity. I think he had the good faith and reasonable belief that what he was doing was within the bounds of the law." Trans. p. 27, 11/14/97).

At the court ordered deposition of the petitioner on November 18, 1997, the petitioner stated the following objection: Mr. Moore: I have an objection to this deposition and this objection is based on a Supreme Court decision. The decision is *William Jefferson Clinton* versus *Paula Jones*, No. 95-1853, Supreme Court of the United States. . . . . .William Jefferson Clinton is the president, the current president of the United States of America. The citation is 117 Supreme Court 1636, 1997 U.S. Lexus 3254, 137 law edition, 2nd, 945. In this particular case it states immunity should be decided at the earliest possible stage of litigation. This is the Supreme Court of the United States. Now, in this particular case, Paula Corbin brought a suit against the president of the United States. Discovery on both sides was suspended until the Supreme Court of the United States decided whether the president of the United States was immune. Paula Corbin was deposed for discovery purposes last week This case was decided by the Supreme Court on May 27, 1997. You got that? . . . . . Now, that's all I have to say with respect to the Paula Corbin case, but I have another case here which more clearly states what the rules are with respect to discovery and immunity. This case is *Rakovich* versus *Wade* cited as 850, Fed. 1180. That's the Seventh Circuit, 1988. Footnote number 19, specifically states: Harlow does not allow discovery until the issue of whether official's alleged conduct violated a clearly established constitutional right has been determined on a motion for summary judgment. That's my objection. There has been no motion for summary judgment with respect to the immunity raised in the defendant's answer. The district court has not decided the immunity issue; therefore, there should be no discovery deposition today according to law. Now, if Counsel would like to read these decisions, I will gladly present them to him. . . . . .Mr. DeBonis: All right my response to the objection, which will be delivered to the Court at the appropriate time, will simply state as I do now, that immunity is a question of law for the Court. It is a fact sensitive inquiry. In order for the Court to judge whether immunity is available to defendant, etc. . . . It will be appropriate for the Court, therefore, to determine the immunity issue after this deposition, etc. . . . Mr. Moore: With respect to immunity, the United States Supreme Court, Justice Stevens, in

footnote number 19 of *Rakovich* versus *Wade* specifically states, Harlow does not allow discovery until the issue of whether the official's conduct violated a clearly established constitutional right has been determined on a motion for summary judgment. Mr. DeBonis: And my response to that, sir, with all due respect right now is, and I'll give him a more full response later if and when this matter is presented to the Court, that a motion for summary judgment requires the submission of discovery materials or affidavits. etc. . . . . Mr. Moore: And let the record reflect that the defendant's answer specifically raised the defense of qualified immunity with respect to liability for defendant, Molina. And in comparison with Clinton versus Corbin, discovery was halted until the issue of immunity was decided not only in a district court and in the Circuit Court of Appeals but by the Supreme Court of the United States without any further pleadings except the complaint and the answer before the court, okay? Mr. DeBonis: Well, let me just--before I forget the thought, our response to that would be that was a different kind of immunity based on the status of the president which required no factual amplification of the plaintiff's complaint. etc. . . . . Mr. Moore: Since you have stated it was a different kind of immunity, I would like to state to you, Harlow was not the kind of immunity that the president of the United States was raising. Harlow was a qualified immunity. The same type of immunity for which you have raised and not presented the Court with the motion for summary judgment. Mr. DeBonis: That's right. Harlow says no discovery until summary judgment. Mr. Moore: A motion-- Mr. DeBonis: Is that correct? Motion for summary judgment; is that correct? Mr. Moore: Right. . . . . Well, I just wanted to make clear for the record that you understood what Harlow stood for with respect to immunity and depositions and discovery. Mr. DeBonis: I am taking this deposition pursuant to the notice I issued twice and the order of the Court in this matter and baring an order from the Court ordering me not to take it, I am constrained to take it. . . . . Mr. Moore: And I would like to proceed from the notice that I received from you and state on this record what that notice was. Mr. DeBonis: You have already stated to the Court in your motion for sanctions and entry of default; is that what you mean? Are you complaining about the manner of service? . . . . . Mr. Moore: Not only the manner of service, but we should look at the content of the notice, the very content of it. We have a copy of it, of the first notice that was hand delivered. . . . . .Mr. DeBonis: Oh yeah, Indiana Rules of Procedure. But the second was find. . . . . .Because I want to state for the record, Mr. DeBonis what it specifically states. The content of the first notice of deposition specifically states, notice of deposition to Michael Moore, 1202 East Chicago Avenue, East Chicago, Indiana 46312. The parties to the above-captioned cause are hereby notified that the defendant will before an officer taking

deposition proceed et cetera, pursuant to Trial Rule 30 of the Indiana Rules of Procedure.

This is your notice of deposition. such a notice in addition to the means used to deliver the notice being contrary to the Constitution of the United States, the Federal Rules of Civil Procedure and the landmark decision of *McCulloch* versus *Maryland*. This notice is contrary to the Constitution of the United States, the Federal Rules of Civil of Procedure and the landmark decision of *McCulloch* versus *Maryland*. The Indiana Trial Rules are an enactment into law of rules of practice before the Indiana courts. They have no application whatsoever to the Federal District Court. They are contrary to the Constitution of the United States, The Federal Rules of Civil Procedure, and the most widely publicized decision of the Supreme Court of the United States of America. Every textbook on constitutional law, every textbook on American History for any college student, and probably for any high school student, includes the case of *McCulloch* versus the *State of Maryland*. . . . . etc. There are Federal Rules of Civil Procedure upon which a notice of deposition may be issued, but the Indiana Rules of Trial Procedure have no application whatsoever in the United States District Court. . .etc. (From page 13 of this petition to this specific part of page 15, are facts stated from the deposition of the petitioner, pages 1-15).

At the conclusion of the deposition of the petitioner, the following was stated: Mr. DeBonis: . . . . , I asked you whether I can deliver this deposition via an East Chicago police officer who would be delivering it to your home. What is your reply to that? Mr. Moore: My specific reply to it? Mr. DeBonis: Will you authorized that or not? Mr. Moore: That the means of using the East Chicago Police Department-- Mr. DeBonis: I know it's contrary to the constitution, but here's what I'm getting at, please tell me how you want this delivered to you then. Mr. Moore: I do not authorized you and I cannot authorize you to use the East Chicago Police department-- Mr. DeBonis: Who do you want to bring this to you? Mr. Moore: Let me finish-- to intervene in the process of the United States District Court for the Northern District of Indiana. I cannot authorize that. Mr. DeBonis: Delivery of papers can be done by anyone. I'm just asking you, and I'm not going to do it because I'm not going to end up being a witness in my own case. Now, I'm going to tell you right now the unless you tell me, make other arrangements, for picking up the transcript, I am going to deliver it to you by a police officer. He's going to do nothing but leave it at your place of residence, that all he going to do.

You won't cooperate in helping me get documents to you, and frankly, I believe your argument the that the constitution forbids a sworn peace of the City of East Chicago to deliver papers to be without merit or foundation, but that's for the judge to decide. . . . . .

.etc..(Dep. p. 89, 90, 11/18/97)

On January 22, 1998, after reviewing with the petitioner, some of the documents that had been filed with the court for preparation of trial, the respondents call the office of the district court judge to confirm the trial date of January 26, 1998, for which they were informed that the date of January 26,198, was not the actual trial date, but on that date the case would be placed on the secondary civil setting. (Trans. p. 3, 1/26/88; Mot. to Recon. p. 2, 2/6/98). Subsequent to the respondents learning of the secondary setting, the petitioner and the respondents reviewed no more documents for preparation of trial; and the respondents went to the district court to confirm the trial date and requested that the petitioner telephone the respondents at 5:00 p.m. on January 22, 1998. (Id. p. 3, 4; Id. p. 2). On January 23, 1998, the respondents informed the petitioner, that the trial was set for January 26, 1998, at 8:30 a.m. (Trans. 1/26/98, p. 3,4).

On January 26, 1998, the petitioner appeared at the court and informed the court that the petitioner was not ready to proceed; for which the court informed the petitioner that no continuance would be allowed, that the case had been set for trial.(Trans. 1/26/98, p. 2, 9, 10, 11, 12, 16, 17, 20; Append. p. 14).

At three separate and distinct intervals during the hearing the petitioner made reference to the petitioner's motion for sanctions and entry of default judgment filed in open court on November 14, 1997; for which the court replied that the motion for sanctions was taken under advisement and the motion for entry of default was denied.(Trans. 1/26/98, p. 7, 10, 20, 34). (Append. p. 13, 14).

Subsequent to the court stating that one of the contested issues of fact in the pretrial order was whether appellee, Molina, acted pursuant to an objectively reasonable belief that his conduct was in conformance with the law such that he was entitled to qualified immunity from liability under section 1983; the petitioner stated to the court: The Supreme Court of the United States has stated that the qualified immunity should be decided by the court prior to trial. (Id. p. 29-30; Append. p. 14). The petitioner was permitted to state first name of the case *William Jefferson Clinton*, only, and no other cases with respect to the issue of qualified immunity by the Supreme Court and the Circuit Court of Appeals. (Id.p. 31, 32, 33, 34; Append. p. 15). Subsequent to being told by the court that the petitioner could read the rules of the United States Supreme Court and the Seventh Circuit with respect to qualified immunity to the Seventh Circuit after the trial; the petitioner informed the court that the petitioner should take an appeal to the Seventh Circuit with respect to the immunity question. (Id. p. 32). The court refused to grant an interlocutory appeal for the immunity question and the case was dismissed. (Id. p. 32, 36, 37). (Append. p. 16-17).

Summary of Argument.

1. It is the argument of the petitioner that the Court of Appeals for the Seventh Circuit erred in entering a decision affirming the judgment of the district court; and that the Court of Appeals by entering the decision affirming the judgment of district court, departed from the accepted and usual course of judicial proceedings which should call for an exercise of the Supreme Court's supervisory power.

2. In addition it is the argument of the petitioner that the Court of Appeals for the Seventh Circuit has entered a decision in conflict with the decision of another United States court of appeals on an important matter: the determination of the chronological length of the statute of limitations period for application of the statute of limitations to § 1983 Civil Rights claims for violations of Constitutional rights under the Fourth and Fourteenth Amendments; which should call for an exercise of the Supreme Court's supervisory power.

3. In addition it is the petitioner's argument, that the court of appeals has decided an important federal question: the application of federal law for the determination of the accrual for application of the statute of limitations to §1983 claims; in a way that conflicts with the following decisions of the Supreme Court: (1) *M'Cuny* v *Siliman*, 3 Pet 270, 7 L Ed 676 (1830); (2) *Campbell* v *Havrhill*, 155 US 610, 39 L Ed 280, 15 S Ct 596 (1914); (3) *O'Sullivan* v *Felix*, 233 US 318, 58 L Ed 980, 34 S Ct 596 (1914); and (4) *Wilson* v *Garcia*, 471 US 261, 85 L Ed 2d 254, 105 S Ct 1938 (1985).

4. In addition, it is the petitioner's argument that the court of appeals has affirmed a decision of the district court, which states decisions of the court of appeals as legal precedents' on a federal question: [Whether federal law should be used to determine the accrual for application of the statute of limitations in § 1983 claims, when state law is neither inconsistent with the Constitution or the laws of the United States.]; for which the Supreme Court has not decided the federal question with respect to § 1983 claims.

5. Also it is the petitioner argument that the Court of Appeals has decided an important federal question: [i.e. Whether the police had authority to intervene in the process of a federal cause of action, to execute service by hand delivering a letter for notice of deposition and a letter with reference to the pre-trail order. (append. p. 34)]; in way that conflicts with the relevant and landmark decision of the Supreme Court, *McCulloch* v. *Maryland et al.*, 4 Wheat 316, 4 L Ed. 579 (1819).

Argument.

It is the argument of the petitioner that the court of appeals erred in summarily concluding that the petitioner's argument for the entry of default was without merit; even though the court did acknowledge "that the defendants were at most three days late in filing their answer to the complaint and their accompanying motion to dismiss." (Append. p. 3). The basis for the court's arbitrary conclusion was that" since the answer and motion were filed prior to the petitioner obtaining the entry of default, the district court did not abuse it's discretion in vacating the entry of default." (Append. p. 3). The court of appeal's conclusion was arbitrary and without a legal basis, because the court neither acknowledged or applied to the facts and circumstances of the case: Rule 12(a) and Rule 55(c) of the Federal Rules of Civil Procedure; and the tests to set aside an entry of default established by the Seventh Circuit's decision in *U.S.* v. *Di Mucci*, 879 F. 2d 1488, 1495 (7th Cir. 1989).

Rule 12(a) of the Federal Rules of Civil Procedres provides the legal basis for determing the specfic date on which the defendant shall serve an answer. By using the date on which the petitioner obtained the clerk's entry of default and not the date specified in the summons under Rule 12(a), the ciricuit court affirmed the error of the district court, that the clerk's entry of default was an error because defendants had filed their answer prior to the petitioner obtaining the default judgment against defendant Molina, and not requiring Molina to satisfy the tests as stated in *U.S.* v. *Di Mucci,* supra, for setting aside an entry of default under Federal Rule of Civil Procedure 55(c). (Append. p. 7). The Circuit Court in affirming the error of the district court as stated in the preceding sentence, arbitrary departed from the accepted and usual course of judicial proceedings which should call for an exercise of the Supreme Court's supervisory power, because the Circuit Court refused to acknowledge and apply the facts and circumstances of the case, to Rule 12(a) and Rule 55(c) of the Federal Rules of Civil Procedure and the tests established by the Seventh Cir., in the decision *U.S.* v. *Di Mucci,* to set aside an entry of default under Federal Rule of Civil Procedure 55(c).

"To set aside an entry of default, the movant has to show that (1) it had good cause for the default; (2) it took quick action to correct the entry; and (3) it had a meritorious defense to the plaintiff's complaint. *U.S.* v. *Di Mucci*, supra." (Append. p. 7, 21). It is the contention of the petitioner, that neither respondentd could show a meritorious defense as stated above, to set aside an entry of default for the petitioner's § 1983 claims that resulted from respondentd Molina's violations of the petitioner's Constitutional rights under the Fourth and Fourteenth Amendments, that occurred on July 8, 1995. To substantiate the preceding contention, the argument of the petitioner is the following.

The petitioner filed a verified complaint with an attached affidavit

prepared not under information and belief, but under penalties of perjury. Within the complaint and subsequent affidavit (Append. p. 28) and the declaration filed by defendant Molina, (Petition p. 9), it was stated defendant Molina did not see the petitioner commit any misdemeanor in his presence, furthermore, defendant Molina was off duty at the time of the unlawful command to stop and subsequent illegal search of the petitioner. Furthermore defendant Molina was neither dressed in the uniform of an East Chicago police officer or driving a marked police vehicle with the insignia of the East Chicago Police Department.(Append.p. 29). Under Indiana law, a police officer may search a person lawfully arrested for a misdemeanor committed in his presence without violation of his constitutional rights. *Campbell v. State*, 198 Ind. 231, 153 N.E. 397,398 (1926). Therefore, under Indian law, respondent Molina's conduct was unlawful, because as stated in the respondent's declaration (Petition p. 9), the respondentd was off duty as a police officer and the respondent did not see the petitioner commit any violation of Indiana law in his presence, this was also stated in the petitioner's complaint and subsequent affidavit. In addition, by application of Indiana law, *Campbell v. State*, supra, respondent Molina admitted, in his declaration to the court (Petition p. 9) to violating the constitutional rights of the petitioner, and could not show a meritorious defense to establish good cause, to set aside the clerk's entry of default, because the respondent did not observed the petitioner committing any misdemeanor in the respondent's presence and the respondent had no lawful authority to stop and search the petitioner.

Respondent City of East Chicago, Indiana, allege no defense whatsoever, either in law or fact, with respect to the petitioner's claims arising from the unlawful conduct of respondentd Molina, on July 8, 1995, even though the petitioner specifically alleged in his verified complaint: that" the City of East Chicago, Indiana failed to adequately train and supervise the respondent Molina; and that the inadequate training of respondent Molina, represented a policy which reflected a deliberate indifference to the plaintiff's constitutional rights, and the policy was the cause of the constitutional violations too the petitioner; and that the deliberate indifference with respect to the petitioner's Constitutional Fourth and Fourteenth amendments rights continued to exist with respect to respondent Molina, until July 8, 1995, whereupon the respondent Molina without probable cause, without the uniform of an East Chicago police officer, and while driving his own personal vehicle illegally stopped and illegally searched the plaintiff in violation of the Fourth and Fourteenth Amendments to the Constitution." (Compl. p. and 3). Therefore, the petitioner should have been granted a default judgment under Federal Rule of Civil Procedure 55(b) against respondent, the City of East Chicago, Indiana

as a matter of law, for the City of East Chicago's failure to show any cause for setting aside an entry of default under Federal Rule Civil Procedure 55 (c).

Statute of Limitations

It is the argument of the petitioner that the court of appeals erred in summarily affirming the district court's decision to dismiss the petitioner's August 15, 1994, claims as time barred by the statute of limitations: that the summary arbitrary conclusion, that" the petitioner's contentions has no merit," with respect to the application of the statute of limitations, is a decision of the court of appeals affirming a judgment of the district court that departs from the accepted and usual course of judicial proceedings which should call for an exercise of the Supreme Court' supervisory powers; that the court of appeals has entered a decision in conflict with the decision of another United States court of appeals on an important matter, (i.e. the determination of the accrual period for application of the statute of limitations in § 1983 Civil Rights claims for violations of constitutional rights under the Fourth and Fourteenth amendments); and that the Court of Appeals has decided an important federal question (i.e. Whether state law should be applied for the purpose of determining the beginning accrual period for application of the Indiana statute of limitations to section 1983 claims.), in a way that conflicts *Wilson* v. *Garica*, 471 US 261, 85 L Ed. 254, 105 S Ct 1938 (1985).

It is the argument of the petitioner that August 16, 1994, the date the petitioner was release from the East Chicago jail, is the date the district court should have used for the purpose of determining the beginning date for the accrual period for application of the statute of limitations; and not the date of August 15, 1994, the date of the petitioner's illegal search, false arrest and false imprisonment. To substantiate the argument, the petitioner stated to the court of appeals that the Supreme Court in *Wilson* v. *Garcia*, supra p. 269, stated the following: "Only the length of limitation period, and the closely related questions of tolling and application are to be governed by state law." Footnote 17. "In virtually all statute of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival and questions of application." *Johnson* v. *Railway Express Agency, Inc.*, 421 US 454, 464, 44 L Ed 2d 295, 95 S Ct 1716, (1975); See also *Chardon* v. *Fumero Soto*, 462 US 650, 657, 77L Ed 2d 74, 103 S Ct 2611 (1983); *Board of Regents* v. *Tomanio*, 446 US at 484, 64 L Ed 2d 440, 100 S Ct 1790 (1980), (Id. 85 L. Ed 2d at 262). The Supreme Court further stated in *Board of Regents* v. *Tomanio*,; the following prior to a quote which included the preceding footnote 17 above; " We went on to observe that this borrowing logically included

rules of tolling . . . . . etc." A section 1983 action is subject to the statute of limitations governing personal injury claims in the state where the alleged injury occurred. *Wilson* v. *Garcia*, supra at 279. The Indiana statute of limitations for personal injuries, requires a suit to be filed within years of the accrual of the cause of action. [Indiana Code sec. 34-1-2 (1)]. Under Indiana law a claim for the injury of false imprisonment accrues on the date of release of the false imprisonment and not the date of the imprisonment: "Both counsel for appellants and appellee accept the established law that the statute of limitations did not begin to run until the termination of the imprisonment. "*Matovina* v. *Hult*, 123 N. E. 2d 893, 897. Under Indiana law false imprisonment consists of an unlawful restraint upon upon one's freedom of locomotion or the deprivation of liberty of another without consent." *Batten* v. *McCarty*, 86 Ind. App. 462, 202 N. E. 2d 563, 586 (1927).

With respect to the district court's order dismissing the petitioner's claims arising on August 16, 1994, the holding in *Wilson* v. *Garcia* as stated in preceding paragraph above, was stated by the district, however the accrual as determined by Indian law was not used for the purpose of application of the Indian statute of limitations; and federal law, as developed by the United States Court of Appeals for the Seventh, Sixth and Third Circuits was used to determine the accrual for the § 1983 claim.[3] (Append. p. 10-11). It is true that federal law determines the accrual of a section 1981 claim, however, section § 1983 does not have a statute of limitations provision. In *Wilson* v. *Garcia*, the following was stated: "The Reconstruction Civil Rights Acts do not contained a specific statute of limitations governing § 1983 (*O'Sullivan* v. *Felix*, 233 US 318, 58 L Ed 980, 34 S Ct 596 (1914),--"a void which is common place in federal statutory law." *Board of Regents* v. *Tomanio*, 446 US 478, 483, 64 L Ed 2d 440, 100 S Ct 1790 (1980). When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local limitation as federal law if is not inconsistent with federal law or policy to do so. (See e.g., *Runyon* v. *McCrary*, 427 US 160, 180-182, 49 L Ed 2d 415, 96 S Ct 2586 (1976); *Auto Workers* v. *Hoosier Cardinal Corp.* 383 US 696, 704, 16 L Ed 2d 192, 86 S Ct 1107 (1966); *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 US 390, 397-398, 51 L Ed 241, 27 S Ct 65 (1906); *McClaine* v. *Rankin*, 197 US 154, 158, 49 L Ed 702, 25 S Ct 410 (1905); *Campbell* v. *Haverhill*, 155 US 610, 617, 39 L Ed 280, 15 S Ct 217 (1895). Id. at 266-267.

In the decision *O'Sullivan* v. *Felix*, supra above, a decision with respect to whether to apply a federal or state statute of limitations to a cause of action arising under the Civil Rights of 1871 (§ 1983), the

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3. McCune v City of Grand Rapids, 842 F. 2d 903, 906 (6th Cir. 1988); Sandutch v Muroski, 684 F. 2d 252, 254 (3d Cir. 1982); Rinehart v Locke, 454 F. 2d 313, 315 (7th Cir. 1971); Perez v Sifel, 57 F. 3d 503, 505 (7th Cir. 1995).

Court stated the following: "That the action depends upon or arises under the laws of the United States does not preclude the application of the statue of limitations of the state is established beyond controversy by cases cited by the circuit court and by *McClaine* v. *Rankin*, 197 US 158, 49 L Ed 702, 25 S Ct 410 (1905). ¶ It is therefore not necessary to pursue in detail the argument of plaintiff based on the postulate that "the Sovereign alone can limit the right of action," and that because the injury was inflicted on him in violating Federal laws the limitation of the state should not apply. Congress, of course, could have, by specific provisions prescribed a limitation, but no specific provisions is adduced." *O'Sullivan* v. *Felix*, supra at 324.

In the decision *McCluny* v. *Silliman*, supra above, the Supreme Court in 1830; in a suit that was instituted in the Circuit Court of Ohio on December 15, 1823; stated the following: " The decision of this case depends upon the construction of the statute of Ohio, which prescribes the time within which certain actions must be brought. It is a well-settled principle that a statute of limitations is the law of the forum, and operates upon all who submit themselves to its jurisdiction. ¶ In the thirty-fourth section of the Judiciary Act of 1789, it is provided, " that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. ¶Under this statute, the Acts of Limitations of the several States, where no special provision has been made by Congress, form a rule of decision in the courts of the United States, and the same effect is given to them as is given in the in the State courts." Id. at 276-277. It should be noted that in 1895, the question was reexamined in another context, but the conclusion remained firm. *Campbell* v. *Haverhill*, supra above.

It should be clear from the above, that for the past two-hundred years, that when Congress has not provided a specific provision for application of the statute of limitations for a federal cause of action, that the application of a state's statute of limitations should be applicable to a federal cause of action, and the same effect should be given to them as is given in the state courts. In fact the Supreme Court in the decision, *Wilson* v. *Garcia*, supra above, specifically stated: "When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local limitation as federal law if is not inconsistent with federal law or policy to do so.- Footnote 12." Id. 266-267. The Court further stated, "Only the length of the limitation period, and closely related questions of tolling and application (Footnote 17) are to be governed by state law." Id. at 269. Therefore, it should be clear from the above that the court of appeals erred in affirming the decision of the district court, to dismiss the petitioner's claims arising on August 16, 1994, as time barred by the

application of federal law to determine the accrual for the Indiana statute of limitations. Furthermore, it is the argument of the petitioner that the district court erred in using federal law as developed by the United States Court's of Appeals for the Seventh, Sixth and Third Circuits to determine the accrual for application of the statute of limitations with respect to § 1983 claims. In addition, it is the argument of the petitioner that use of federal law to determine the accrual period for pplication of the Indiana statue of limitations is contrary to § 1983, and in conflict with the above decisions of the Supreme Court: (1) *McCluny* v. *Siliman*; (2) *O'Sullivan* v. *Felix*; and (3) *Wilson* v. *Garcia*, because none of the decisions used by the district court from the circuit courts to establish the legal standard that federal law and not state law, should be used to determine the accrual for § 1983 claims, is derivative of any federal law or decision of the Supreme Court for § 1983 claims.

In addition, it is the argument of the petitioner, that by application of the Indiana decision, *Matovina* v. *Hult*, supra above; the date the petitioner was released from jail, and not the date the petitioner was arrested, is the date that begins the running of the accrual period for the personal injury of false imprisonment. Also, the date the petitioner was released from jail, should have been used by the district court for the determination of the accrual period for the purpose of application of the Indiana statute of limitations to the petitioner's § 1983 claims that occurred on August 16, 1994; and the determination of the accrual period, by application of Indiana law, is not inconsistent with the Constitution and laws of the United States, 42 USC § 1983 [42 USCS § 1983], and 42 USC § 1988 [42 USCS § 1988]; and the court of appeals erred in affirming the decision of the district court, dismissing the petitioners claims that occurred on August 16, 1994 as time barred by application of the statute of limitations.

QUALIFIED IMMUNITY

With respect to the issue, whether the defense of qualified immunity should be decided prior to selecting a jury for trial. It is the argument of the petitioner, that the defense of qualified immunity should be decided on a motion for summary judgment prior to selecting a jury for trial; that it is the responsibiltiy of the defendant to come forward with the motion for summary judgment with supporting affidavits or declarations to support the pleaded defense of qualified immunity *Harlow* v. *Fitzgerald*, 457 US 800, 818, 73 L Ed 2d 396, 102 S Ct 2727; that it would be inherently unfair and prejudicial to the petitioner, who observed the rule in Harlow, and neither attempted nor took any discovery, to proceed with trial without any discovery, when the

defendants had been allowed discovery and neither observed the rule in *Harlow* v. *Fitzgerald*, supra, and after discovery presented no motion for summary judgment with supporting affidavits or declarations to support the defense of qualified immunity.

At this point the petitioner incorporates, attaches and makes part of this petition, the memorandum of law that was attached, incorporated and made a part of a motion to reconsider filed on February 6, 1998 and denied on April 1, 1998, by the district court. (Append. p. 29-32). For the relevant facts see the following. (1) Transcript of proceedings 1/26/98 (Append. p. 13-17); (2) Transcript of pre-trial proceeding 11/14/97. Append. p. 20-23); (3) Statement of the case. (Petition p. 11-13).

Furthermore it is the argument of the petitioner that the court of appeals decision with respect to the petitioner and the application of the rule in Harlow, is completely at variance with the seventh circuit's en banc decision, *Rakovich* v. *Wade*, 850 F. 2d 1180, 1206 n. 19 (1988). (Petition p. 14).

DEFAULT WITH RESPECT TO THE CONSTITUTION

On November 14, 1997, the petitioner was granted permission in open court to file and deliver a motion for sanctions and entry of default against the respondents, for conduct by other police officers of the East Chicago Police Department, which interfered with the law in its regular course of administration in the United States District Court for the Northern district of Indiana. (Append. p. 32). On three separate and distinct intervals, the district court denied the petitioner's motion on January 26, 1998. [Pet. p. 16 (Append. p. 13-14)]. The circuit court of appeals concluded that the petitioner's argument was moot with respect to the Constitution. (Apend. p. 3). In addition to the facts stated in the petitioner's motion for entry of sanctions and default, (Append. p. 33-34); other relevant facts are the following: (1) Oral order of the district court denying petitioner's motion, (Append. p. 13-17); (2) Defendant's motion to grant relief, (Append. p. 23-25); (3) Defendant's Memorandum of Law, (Append. p. 33); (4) Conclusion of the court order deposition, ((Append. 18-20); and (5) Statement of the case, (Pet. p. 14-16). The following is the analysis included in the memorandum of law attached to the above motion, with the exception that the issue has been rephrased for this petition to the Supreme Court: Whether police have authority to intervene in the process of a federal cause of action to execute service by hand delivering a notice of deposition and a letter with reference to a pre-trial order.

"The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "misuse of power, possessed by virtue of

state law and made possible only because the wrongdoer is clothed with authority of state law." *Monroe* v. *Pape*, 365 US at 184, 5 L Ed 2d 492, 81 S Ct 473 (quoting *United States* v. *Classic*, 313 US 299 326, 85 L Ed 1368, 61 S Ct 1031 (1941)). By creating an expressed federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe* v. *Pape*, supra, at 172, 5 L Ed 2d 482, 81 S Ct 473.

It is the argument of the petitioner that the East Chicago police had no lawful authority to hand deliver any letter to the petitioner from the respondents with respect to proceedings before the District Court, under the following:

(1) The Constitution of the United States

(2) The Federal Rules of Civil Procedure, a legislative act of the United States Congress.

(3) The landmark decision of the Supreme Court of the United States of America:

McCulloch v. *The State of Maryland et al.*, 4 Wheat 316, 4 L Ed 579 (1819)

The United States Constitution Article VI, paragraph two states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . . . shall be the supreme Law of the Land; . . . . . etc."

Mr. Chief Justice John Marshall of the Supreme Court, stated in the landmark decision of *Marbury* v. *Madison*, 1 Cranch 137, 2 L Ed 60 (1803), the following:

> " It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by ordinary act.
>
> Between these alternatives there is no middle ground. The Constitution is either a superior or paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts is alterable when the legislature shall please.
>
> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are an absurd attempt on the part of the people, to limit a power in its own nature illimitable.
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be an act of the legislature, repugnant to the constitution is void.
>
> . . . . . .
>
> It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.
>
> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and the courts as well

as other departments are bound by that instrument."

Mr. Chief Justice Marshall further stated in *Cohens* v. *Virginia*, 6 Wheat 284, 285 (1821), the following:

"if it could be doubted, whether from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that "this constitution, and the laws of the United States, which shall be made in pursuance thereto, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding."

This is the authoritative language of the American people; and if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution, and if there be any who deny its necessity, none can deny its authority.' Id at 285.

In *McCulloch* v. *Maryland et al.*, 4 Wheat 316 4 L Ed 579 (1819), a land mark decision of the Supreme Court, Mr. Chief Justice Marshall stated the following:

"But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this--that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subject on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," shall be the supreme law of the land." .... etc.

The government of the United States, then though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding." Id. at 601

..... There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution is so intermixed with the materials which compose it, so blended with its texture, as to be incapable of being separated from it without rendering it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. Id at 606

.....

The sovereignty of a state extends to everything which exist by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution-powers conferred on that body by the people of the United States? We think it demonstrable that that it does not. Those powers are not given by the people of a single state. They are given by

the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer sovereignty which will extend over them." Id 607

From the above three decisions of the Supreme Court by Mr. Chief Justice John Marshall it should be abundantly clear that the "constitution and the laws made in pursuance thereof, are the supreme law of the land. Therefore, given the Constitution Article VI, paragraph two and the above decisions of the Supreme Court, the Federal Rules of Civil Procedure, a legislative enactment into law of rules of procedure in the District Courts of the United States, is the supreme law of the land. There are no provisions within the Federal Rules of Civil Procedure to allow a police officer, employed by a municipality in a state, to intervene arbitrary in the process of a civil action in the District Court. Such arbitrary action, the hand delivering by a police officer employed by a municipality of the State of Indiana, is directly contrary to the Constitution and the decision of the Supreme Court in *McCulloch* v. *Maryland*, supra above.

Furthermore said conduct by the police officers should be view legally, in addition to unlawful arbitrary conduct, as intimidation and coercion against the petitioner for exercising his constitutional right to bring a cause of action against another police officer for misuse of power, possessed by virtue of state law, and made possible only because the wrongdoer is clothed with authority of state law. (Append. p. 34-37).

It is the argument of the petitioner, in addition to the above, that the police have no authority under the Constitution, Article III, Section 1 and 2, to intervene in the process of a federal cause of action to execute service by hand delivering a letter for notice of deposition and a letter with reference to a pre-trial order; and that the circuit court erred in affirming the decision of the district court to deny the motion; and that the circuit court has entered a decision which conflicts with *McCulloch* v. *Maryland*, supra, one of the leading and fundamental decisions on constitutional law in this nations history.

The Constitution, Article III, Section 1, provides: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ...etc." When the respondents executed service on the petitioner, by hand delivering the court related documents, without leave of court, the respondent's acts of conduct completely usurped the constitutional judicial Power that Congress had vested in the United States District Court for Northern District of Indiana, and the judicial Power that extended to the § 1983 Civil Rights claims of the petitioner.

CONCLUSION

The blatant arbitrary action of the police of intervening in the process of a federal cause of action in the United States District Court, finds no support in right principle or in law.[4] Therefore, the Circuit Court of Appeals for the Seventh Circuit erred; in concluding that the petitioner's argument was moot, and affirming the oral order of the district court denying the petitioner's motion for default with respect to the Constituion.

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4. Mr. Justice Sutherland stated the following on arbitrary action: "The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest-- that this shall be government of laws--because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such contingency the courts have always been vigilant, and if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in *Boyd v. United States*, 116 U.S. 616, 635, 29 L. Ed. 746, 752, 6 S. Ct. 520, should never be forgotten: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure . . .

. . . . . To borrow the words of Mr. Justice Day--"there is no place in our constitutional system for the exercise of arbitrary power." *Garfield* v. *United States*, 211 U.S. 249, 252, 53 L. Ed. 168, 174, 29 S. Ct. " *Jones* v. *Securities and Exch. Com.*, 208 US 1, 23-24, 80 L. Ed. 1019, 1025 (1935).

Respectfully submitted,

MICHAEL MOORE
Pro Se Petitioner
1202 E. Dr. Martin Luther King Jr.
Memorial Drive
East Chicago, Indiana 46312

March 10, 2000

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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1. An UNPUBLISHED ORDER of the United States Court of Appeals, 12for the Seventh Circuit, Chicago, Illinois, decided May 17, 1999, and a Petition for Rehearing, denied on August 30, 1999; before the following: Honorable William J. Bauer, Circuit Judge; Honorable Joel M. Flaum, Circuit Judge; and Honorable Daniel A. Manion, Circuit Judge.

UNPUBLISHED ORDER
Not to be cited per Circuit Rule 53

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted May 6, 1999*
Decided May 17, 199

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Joel M. Flaum, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*

MICHAEL MOORE,
Plaintiff-Appellant,

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

No. 98-1544

v.

No. 96-C-264

LUIS A MOLINA, II,and the CITY of EAST CHICAGO,
Defendants/Appellees.

Rudy Lozano, *Judge*

ORDER

Michael Moore brought suit under 42 U.S.C. § 1983, alleging that the defendants violated his Fourth and Fourteenth Amendments rights. After various pretrial proceedings, the district court dismissed the case for want of prosecution, Moore appeals and we affirm.

On August 16, 1996, Moore filed his complaint, alleging that East Chicago police officer Molina searched and arrested him without

probable cause on August 15, 1994, that Molina detained and searched him again without justification, on July 8, 1995; and that the City of East Chicago failed to adequately train and supervise its police officers. On September 19, 1996, the defendants filed an answer and a motion to dismiss as untimely the claims arising from the events on August 15, 1994. The answer listed as the Third affirmative Defense, that Molina was entitled to qualified immunity with respect to all actions alleged in the complaint.

One week later, Moore sought and obtained an entry of default against the defendants. The defendants moved to vacate the default. The district court granted the motion to vacate, finding that the default had been improperly entered, as the defendants, answer already had been filed. The court then issued a scheduling order, setting trial for December 1, 1997.

As the case progressed, Moore resisted responding to the defendants' discovery request, in particular declining to appear for his deposition on two occasions. At a pretrial conference on November 14, 1997, Moore told the court he did not believe, that the defendants were entitled to conduct discovery until the issue of qualified immunity had been resolved. The district court doubting that this contention was supported by case law, ordered Moore to appear for his deposition the following week, but invited him to brief the discovery/qualified immunity issue if he desired. The district court offered to consider any brief filed, and cancel the deposition if Moore's position were correct. Moore filed no brief, however, and the deposition proceeded as scheduled.

On November 26, 1997, the district court struck the trial date of December 1, 1997, and instead scheduled the case as "secondary for the date of January 26, 1998. "Secondary" in this context meant that another trial was set to proceed on that date, but Moore would be expected to be ready for trial should the primary case settle or otherwise be resolved. A few days before trial, Moore was notified by defendants' attorney that this case would indeed go to trial on January 26, 1998. Nevertheless, on January 26, Moore appeared 45 minutes late and told the court he was not ready to proceed. After several attempts by the district court to have the parties draft a statement of the case and a list of witnesses, Moore stated the trial should not go forward because the issue of qualified immunity had not been resolved. Moore persisted with this argument even though the defendants disclaimed any intent to rely on qualified immunity to avoid trial, and despite the district judge's explanation that Moore had already passed up his chance to make this argument. Moore refused to proceed with trial. After attempting to reason with Moore, the district court dismissed the case for want of prosecution. Moore filed a motion to reconsider under Federal Rule of Civil Procedure 59(e), the district court denied it, and

Moore appealed.

We review a district court's dismissal of a case for want of prosecution for abuse of discretion. Johnson v. Kamminga, 34 F.3d 466, 468 (7th Cir. 1994). Here, the district judge tried valiantly to work with Moore so that trial could proceed as schedule, but Moore refused point-blank to try the case. Moore did not seek a continuance; he simply balked at the proceeding. We find no abuse of discretion in the district judge's decision to dismiss the case on this refusal to proceed with the scheduled trial.

Nor is there any merit to Moore's contention that the parties to a case may not proceed with discovery or trial once an issue of qualified immunity has been raised. Qualified immunity is an affirmative defense, and it is the defendant's choice whether to press that defense in an effort to avoid trial. No case law supports Moore's contrary position. Moore relies on a quote from Rakovich v. Wade: "Harlow [v. Fitzgerald, 457 U.S. 800, 818 (1982)] does not allow discovery until the issue of whether the official's alleged conduct violated a clearly established constitutional right has been determined on a motion for summary judgment." 850 F.2d. 1180, 1206 n. 19 (1988) (en banc) (quoting Anderson v. Creighton, 483 U.S. 635, 651 (1987) Stevens, J., desenting)). This quote is taken out of context. If the party pressing a defense of qualified immunity believes that he can establish his entitlement to that defense before discovery, the district court must honor a request for a summary judgment motion prior to discovery. However, in this case, the defendants did not seek summary judgment on their defense of qualified immunity. Rather, they recognized that the merits of the case were interwined with that defense, and proceeded to trial. Moore should not have relied on the defendants qualified immunity defense as a reason to delay his own prosecution of his claims.

Finally, on appeal Moore attacks several of the districts court's pretrial rulings including the vacating of the entry of default, and dismissal of Moore's August 15, 1994 claims as time barred. Neither of these contentions has merit. Federal Rule of Civil Procedure 55(a) provides for the entry of a default when a defendant "has failed to plead or otherwise defend as provided by these rules." Fed. R. Civ. P. 55 (a). The defendants here were at most three days late in filing their answer to the complaint, accompanied by a motion to dismiss. Indeed, they filed their answer and motion before Moore sought the entry of default. Under these circumstances, the district court did not abuse its discretion in vacating the entry of default. Moore's remaining arguments on appeal are moot. Even if the pretrial dismissal of some of his claims were incorrect, it did not harm Moore because his later refusal to go forward with trial subjected all his claims to dismissal for want of prosecution. The judgment of he district court is Affirmed.

* After an examination of the briefs and the record, we have conclude that oral argument is unnecessary, and the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a).

2. The following are the written orders by the Honorable Rudy Lozano, Judge, United States District Court for the Northern District of Indiana, Hammond Division. The caption, the title and number of the case is the same for all the written orders by the Honorable Rudy Lozano, Judge, United States District Court.

1. IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND, INDIANA

MICHAEL MOORE, Plaintiff, v. LUIS A. MOLINA, II, et al. Defendants.	)))))	No. 2:96-CV-264-RL

ORDER

This matter is before the Court on Plaintiff's Motion to Reconsider Order, filed on February 6, 1998. This Court granted Defendant's Motion to Dismiss this case for want of prosecution on January 26, 1998. Plaintiff now moves for reconsideration, which the Court presumes to be pur-suant to Federal Rule of Civil Procedure 59.

Motions to reconsider serve a limited purpose; generally, trial court errors are corrected on appeal. Caisse National de Credit Agricole v. CBI Indus., Inc., 90 F. 3d 1264, 1269 (7th Cir. 1996). A trial court should grant a motion to reconsider only if there is newly discovered evidence or a manifest error of law. Id. In this case, Plaintiff does not allege that there is any newly discovered evidence or a manifest error of law.

A manifest error of law applies only to egregious legal errors. Id. at 1270. "Appeal, not reconsideration, is the time to deal with the majority of legal errors; therefore, a party may not reargue what the court has already rejected. Burney v. Thorn America, 970 F. Supp. 668, 671 (E. D. Wis. 1997). Manifest errors are errors so obvious that no additional explanation is needed or possible." Id.

On the date of trial, ariving over a half an hour past the scheduled trial time, Plaintiff appeared before the Court seemingly unprepared for trial. The Court stated that trial would proceed as scheduled. Plaintiff then raised the issue of qualified immunity. The Court offered Plaintiff to submit a brief on the issue, and maintained that the trial would

proceed that morning. In response, Plaintiff requested leave to appeal the issue to the Seventh Circuit. The Court denied Plaintiff's request, "and Plaintiff refused to proceed further with the proceedings, thereupon the Court dismissed Plaintiff's claim and assessed jury costs.

Plaintiff quotes three cases to support the proposition that the issue of qualified immunity should be resolved prior to trial: Clinton v. Corbin, 117 S. Ct. 1636 (1997) (finding that the constitution does not afford the President temporary immunity, in all but he most exceptional circumstances, from civil damages litigation arising out of events that occurred before he took office; Harlow v. Fitzgerald, 457 U.S. 800 (1982), (holding that presidential assistants "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate a clearly established statutory or constitutional rights of which a reasonable person would have known"); and Rakovich v. Wade, 850 F. 2d 1180, 1206 n. 19(7th Cir. 1988) (noting that "Harlow does not allow discovery until the issue of whether the official's alleged conduct violated a clearly established constitutional right has been determined in a motion for summary judgment.) The Court is unable to understand how these cases prove Plaintiff's argument. Defendants were not seeking to avoid trial by raising the issue of qualified immunity. Furthermore, the Court notes that plaintiff already raised this issue on January 26, in hopes of continuing the trial to a later date. As explained above, a party may not reargue issues the Court has already rejected. Therefore, Plaintiff's Motion to Reconsider Order is Denied.

ENTER: 4/1/98

/s/ RUDY LOZANO
RUDY LOZANO, JUDGE
United States District Court

2. ORDER by the Honorable RUDY LOZANO, JUDGE, UNITED STATES DISTRICT COURT, ENTERED: 3/20/98.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE,)
Plaintiff,)
)
vs.) No. 2:96-CV-264-RL

LUIS A. MOLINA, II, et al.)
Defendants.)

ORDER

This matter is before the Court on Defendant's Motion for Allowance of Costs and Attorney's Fees, filed on February 2, 1998.

Plaintiff filed a civil rights action against Defendants. On January 26, 1998, the date the case was set for trial, the Court granted Defendants motion to dismiss for want of prosecution with prejudice. Defendants are clearly the prevailing parties in this action.

Defendants requests that Plaintiff be taxed $50 in witness fees for lay witness called to appear on the first day of trial. 28 U.S.C. section 1920 allows the Court to tax as costs, inter alia, fees of witnesses. 28 U.S.C. §1982 (3). On January 26, 1998, Defendants were prepared for trial when the court granted their motion to dismiss for lack of prosecution. The Court finds that Plaintiff be taxed for witnesses Defendants intended to call on that first day of trial.

Pursuant to 42 U.S.C. section 1988, Defendants also seek attorney's fees of $12,523.75 for time spent on the case and $65.01 for costs of litigation. In support of their request, Defendants provide a declaration of Antony DeBonis, Jr. which explains the attorney's and assistants hourly rates, and a detailed account of the hours spent preparing for the case. Muscare v. Quinn, 614 F. 2d 577, 579 (7th Cir. 1980). The Court has reviewed the declaration and finds the attorney's fees and costs to be reasonable.

According to Local Rule 7.1, a non moving party shall have fifteen days after service of the motion in which to serve and file a response. Six weeks have passed since Defendants filed the motion for attorney's fees, without a response from Plaintiff. Because Plaintiff does not object, Defendants' motion is GRANTED. Plaintiff is ORDERED to pay Defendants $50 for witness fees, $12,523.75 for attorney's fees, and $65.01 for costs of litigation.

ENTERED: 3/20/98

/s/ RUDY LOZANO
RUDY LOZANO, JUDGE
United States District Court

3. ORDER by the Honorable RUDY LOZANO, JUDGE, UNITED STATES DISTRICT COURT, ENTERED: January 26, 1998.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE, Plaintiff,	)	
vs.	)	No. 2:96-CV-264-RL
LUIS A.MOLINA, et al. Defendants.	)	

ORDER

Pursuant to this Court's Minute Entry of January 26, 1998, jury costs in the amount of $164.02 are hereby assessed against the plaintiff pro se Michael Moore, due to unpreparedness, failure to prosecute and refusal to proceed with case at trial, selection of jurors and presentation of witnesses. Jury cost in the amount of $164.02 to be paid to the Clerk of Court at 507 State Street, Hammond, Indiana.

ENTERED: January 26, 1998

/s/ RUDY LOZANO
RUDY LOZANO, JUDGE
United States District Court

4. ORDER by the Honorable RUDY LOZANO, JUDGE, UNITED STATES DISTRICT COURT, ENTERED: 11/13/97

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE, Plaintiff,	)	
vs.	)	NO. 2:96-CV-264
LUIS A. MOLINA, II, et al. Defendants.	)	

ORDER

This matter is before the Court on Defendant's (sic) Motion to Grant

Relief From Order Controlling Trial or is the Alternative to Dismiss, filed on November 12, 1997.

According to Defendants, Plaintiff, Michael Moore (Moore") failed to appear twice for his deposition, and failed to participate, in the preparation of the pretrial order. However, Defendants never filed a motion to compel Moore to appear for his deposition. The Court will rule on this motion at the final pretrial conference on November 14, 1997.

ENTER: 11/13/97

/s/ RUDY LOZANO
RUDY LOZANO, JUDGE
United States District Court

5. ORDER by the Honorable RUDY LOZANO, JUDGE, UNITED STATES DISTRICT COURT, ENTERED: 7/30/97.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE, Plaintiff,	)	
vs.	)	No. 2:96-CV-264-RL
LUIS A. MOLINA, II, et al. Defendants.	)	

ORDER

This matter is before the Court on the Motion to Reconsider Order filed by Plaintiff, Michael Moore, on July 7, 1997. On June 24, 1997 the Court entered an order denying Plaintiff's application for default judgment against Defendant, Luis Molina, granting Molina's motion to set aside the Clerk's entry of default and granting Defendant's motion to dismiss part of Plaintiff's complaint. In his motion to reconsider, the Plaintiff does not present any new grounds or any new law which would cause the Court to reverse its prior decision. The Motion to Reconsider Order is Denied.

ENTER: 7/30/97

/s/ RUDY LOZANO
RUDY LOZANO, JUDGE
United States District Court

6. ORDER by the Honorable RUDY LOZANO, JUDGE, UNITED STATES DISTRICT COURT, ENTERED: 6/24/97.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE, Plaintiff,	)	
vs.	)	No. 2:96-CV-264-RL
LUIS A. MOLINA, II, et al Defendants.	)	

ORDER

This matter is before the Court on the Application for Default Judgment filed by plaintiff against Defendant, Luis Molina II ("Molina"), on September 27, 1996; Motion to Set Aside Clerk's Entry of Default filed by Defendant Molina on October 3, 1996; Motion to Dismiss filed on September 19, 1996. For the reasons set forth below, the Application for Default Judgment is Denied; Defendant Molina"s Motion to Set Aside Clerk's Entry of Default is Granted; and Defendants' Motion to Dismiss is Granted with respect to Plaintiff's claims arising on August 15, 1994.

BACKGROUND

Plaintiff, Michael Moore ("Moore"), applied for and obtained a clerk's entry of default against Defendant Molina and now seeks a default judgment. Molina has moved to set aside entry of default. Defendants, Molina and the City of East Chicago,, have also moved to dismiss Moore's complaint with respect to his claims arising on August 15, 1994. Defendants argue that these claims are barred by the statue of limitations.

Moore filed his complaint on August 16, 19996. On September 16 defense counsel entered an appearance, on September 19 Defendants filed their answer along with their motion to dismiss. On September 27, Moore applied and obtained a clerk's entry of default against the Molina. Six days later, Molina moved to set aside the entry of default.

In his complaint, Moore alleges that Molina, as a police officer for the City of East Chicago, and the City of East Chicago,, violated his Fourth and Fourteenth Amendments rights. Spcifically Moore alleges that Molina executed an unlawful search and seizure of Moore and

incarcerated him on a false charge on August 15, 1994. Moore further alleges that these constitutional violations continue to exist until July 8, 1995, when Molina unlawfully stopped and searched Moore again. Finally, Moore alleges that the City of East Chicago, inadequately trained and supervised Molina.

DISCUSSION

Defendant Molina moves under Federal Rule of Civil Procedure 55(c) to set aside the entry of default against him. Under Federal Rule of Civil Procedure 55(a) and upon application of a party, the clerk of the Court should enter default against those parties who have failed to appear in accordance with the Rules of Civil Procedure. To set aside and entry of default, the movant has to show that (1) it had good cause for the default; (2) it took quick action to correct the entry; and (3) it had a meritorious defense to the plaintiff's complaint. U.S.v. Di Mucci, 879 F. 2d 1488, 1495 (7th Cir.). However, because in this case the default was entered erroneously, the Court will not require Molina to satisfy this test.

The defendants filed their answer on September 19, 1966 several days late. The application for entry of default by the Clerk did not occur until September 27. The entry of default at that time was an error, because Molina had not failed to plead or otherwise defend as required by as required by Federal Rule of Civil Procedure 55(a). Neither was default an appropriate sanction for the untimely pleading for the Court should enter default only sparingly in those circumstances that merit such a drastic action. See e.g., Di Mucci 879 F. 2d at 1493-94. See also Ramussen v. Am. Nat'l Red Cross, 155 F.D.R. 549 (S. D. W. Va. 1994) (where the court found that filing an answer several days late did not warrant entry of default and set it aside). Accordingly, the Court Grants the Motion to set aside the entry of default and denies the motion for entry of default judgment.

MOTION TO DISMISS

Moore's complaint appears to include claims based on incidents that took place on August 15, 1994 and on July 8, 1995. The Defendants move to dismiss those claims based on the August 15, 1994, incident, arguing that they are barred by the statue of limitations.

Section 1983 claims are subject to the statute of limitations that applies in state personal injury actions. Wilson v. Garcia, 261, 276 (1985). In Indiana, a two year statue of limitations applies to 1983 actions. Sellars v. Perry, 80 F. 3d 243, 245 (7th Cir. 1996).

Although state law determines the statue of limitations for section 1983 actions, federal law determines when section 1983 claim accrues.

Sellars, 80 F. 3d 243, 245. A section 1983 action accrues when the plaintiff knows or a has reason to know of the injury that is the basis of his action. Id. Thus in this case the essential question is when did Moore know, or should have known, that his cause of action against the Defendant arose.

In the affidavit attached to the complaint, Moore alleges that he was subjected to unreasonable search and seizure on the evening of August 15, 1994. As a result of the allegedly false arrest, Moore had to spend the night in jail. The next day, August 16, 1994, he was released on bond. The charges were dropped during his first court appearance. Because Moore filed his complaint on August 16, 1996, Defendants argue that the Plaintiff's claims are barred by the statue of limitations.

The Court agrees with Defendants. A cause of action under section 1983 for an improper arrest or search accrues at the time of arrest or the search. Perez v. Sifel, 57 F. 3d 503, 505 (7th Cir. 1995). Deary v. Three Un-Named Police Officers, 746 F. 2d 185, 193 (3d Cir. 1984); Rinehart v. Locke, 454 F. 2d 313,315 (7th Cir. 1971). Thus, Moore's claims accrued on August 15, 1994, when he was arrested and searched. When the complaint was filed on August 16, 1996, the claims were time barred.

Moore cites Matovina v. Hult, 123 N. e. 2d 893 (Ind. Ct. App. 1955) for the proposition that the statue of limitations did not begin to run until August 16, 1994, when he was released from prison. Under Indiana law (assuming Matovina is still good law), a claim of false imprisonment may accrue the date of release but that is not the law for a federal claim under section 1983. See McCunne v. City of Grand Rapids, 842 F. 2d 903, 906 (6th Cir. 1988) Sandutch v. Muroski, 684 F. 252, 254 (3d Cir. 1982); Anderson v. City of Chicago, 803 F. Supp. 1327, 1329 (N.D. Ill. 1992). When the plaintiff knows at the time of his arrest that his constitutional rights have been violated, any claim based on the false arrest or imprisonment arising from that occasion accrues at the time of his arrest regardless of any time he spent in prison.

Neither did one-night incarceration suffered by Moore toll the statue of limitations. Although state tolling principle do apply in sect-ion 1983 actions, Hondo v. Sterling, 21 F. 3d 775, 780 (7th Cir. 1994), in Indiana incarceration does not toll the statue of limitations in civil suits. Diaz v. Carpenter, 650 N. E. 2d 688, 691 (Ind. Ct. App. 1995).

Finally, Moore appears to claim in the complaint that the violation of his constitutional rights was continual from early 1994 until July 8, 1995, when he was allegedly illegally stopped and searched again by Defendant Molina. In his motion in response to the motion to se aside the default, Moore also mentioned another incident that occurred earlier in 1994 involving Defendant Molina. Moore, however, has not provide the Court with any facts as to how these incidents can be characterized

as a continuing tort rather than separate incidents with Defendant Molina. The theory of continuing wrong does not apply in cases such as these where each incident is an independent discreet and definite for which the Plaintiff could have sought redress independently. See Wilson v. Giesen, 956 F. 2d 738, 748 (7th Cir. 1992). Accordingly, the alleged violations of Moore's constitutional rights that occur in the early part of 1994, in August 1994, and on July 8, 1995, did not constitute a continuing tort for purposes of section 1983.

The statute of limitations for the alleged incident in July 1995 will not run until July 1997. By filing his complaint on July 15, 1996 Plaintiff was clearly within the statute of limitations as to any claims arising from that incident. Therefore, Plaintiff's claim for alleged illegal stop and search on July 8, 1995, is not time barred.

CONCLUSION

For the foregoing reasons, the Application for Default Judgment is Denied; Defendant Molina's Motion to set Aside Clerk's Entry of Default is Granted; and Defendants' Motion to Dismiss is Granted with respect to the plaintiff's claims arising on August 15, 1994. The Court Orders the Clerk to set aside the Entry of Default against the Defendant Molina entered on September 27, 1996. Any claims arising from the incident occurring on July 8, 1995, remain pending.

ENTER: 6/24/97

/s/ RUDY LOZANO
RUDY LOZANO, JUDGE
United States District Court

3. Oral Opinion by the Honorable Rudy Lozano, Judge, United States District Court with respect to Petitioner's Motion for Sanctions and Entry of Default with Respect to the Constitution.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE, Plaintiff,	]
vs.	] DOCKET NO: 2:96-CV-264-RL] APPEAL NO: 98-1544
LUIS A. MOLINA, II, and the CITY OF EAST CHICAGO INDIANA, Defendants.	]] MONDAY, JANUARY 26, 1998] 9:30 A.M] JURY TRIAL

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUDY LOZANO, JUDGE PRESIDING

At three separate and distinct intervals during the hearing on January 26, 1998, the petitioner made specific reference to the petitioner's motion for sanctions and entry of default judgment filed and served in open court on November 14, 1997. The following is from the transcript of proceedings on January 26, 1998., with respect to the motion:
"THE COURT: Is there anything else you wish to say? MR. MOORE: I do have a motion outstanding, your Honor. And I explained that to Mr. DeBonis. THE COURT: What motion do you have outstanding? MR . MOORE: I have a motion for sanctions and entry and default. THE COURT: I have taken that under advisement. Motion for default is denied. Now, what else do you have.? MR. MOORE: All right. Incorporated in that motion, your Honor, was another incident with the East Chicago Police Department. THE COURT: That is not part of this litigation unless you can show it. You can put it into evidence if it becomes relevant for another reason. This litigation deals solely with certain things that have occurred. Now, if you can show why it's relevant and material during the trial, you may be able to get into it. But otherwise, it's not part of your litigation. Mr. DeBonis. MR. DEBONIS: Your Honor, if it please the Court. If the plaintiff is referring to the incident of October 17th, 1997, we have reached agreement that we will offer no objection to the amendment of the pleadings in the pretrial order to allow the plaintiff to assert a claim arising under that incident. THE COURT: Counsel, if you guys stipulate to it, and, you know, there's not a fuss about it, I have no problem with your getting

into it. I do not want to be changing instructions, changing legal research because of another incident that, you know, was not included originally. MR. DEBONIS: The Court should know that all of the papers we have tendered in pretrial reflect the fact that that clam will be made. THE COURT: Mr. Moore, sounds like you won't even get into it. Sounds like he's not going to object. MR. DE BONIS: Your Honor, I just want to state that rather than put Mr. Moore in the position of filing a new case and going through this again in the Court, we felt it would be best if we tried it all at one time. THE COURT: Anything else, Mr. Moore? MR. MOORE: That his position, your Honor. Since this case is about the Fourteenth Amendment of the Constitution, there are two parts to it. Procedural due process. At this particular point, it has not been achieved with respect to the incident of October 17th. THE COURT: Why? MR. MOORE: There is no notice. THE COURT: then, Mr. Moore, don't go into that incident.. MR. MOORE: Your Honor-- THE COURT: The choice is yours. They're saying you can go into it without notice. MR. MOORE: Of course. Of course they're saying that. THE COURT: Mr. Moore, let me make this perfectly clear. At this time, I am not prone to continue this case again. Do you understand? I have a jury downstairs who has been brought here ready to try this case. Now, if the reason for you wanting to get into this new incident is so that we get a continuance, that is not going to happen. MR. MOORE: Your, Honor, that is not the reason. I filed the motion for sanctions and default. THE COURT: I have given you a ruling on that. I am taking sanctions under advisement. Motion for default is denied. MR. MOORE: All right. Incorporated in that motion was an Affidavit, a sworn statement, your Honor, about the incident of October 17th in the pretrial order. There was an agreement to amend the complaint THE COURT: Did you do it? MR. MOORE: Not yet, your Honor. I was waiting on your reply. THE COURT. Motion is denied. I'll make it easy. Okay? Motion is denied . . . . . .etc."(Trans. 1/26/98, p. 7 through 10).

"MR. MOORE: And in addition to that, your Honor, I had an outstanding motion in writing for which there was no response. THE COURT: then we're going to go, Mr. Moore, ...etc." (Id. at 20).

"MR. MOORE: Your Honor, ... You spoke about rules. The Supreme Court of the United States has stated that the qualified immunity should be decided by the Court prior to trial. THE COURT: Mr. Moore, did you have a motion before this Court for me to entertain that? MR. MOORE: A motion? THE COURT: Yes. Did you go-- MR. MOORE: Your Honor, I did not raise the defense of quailified immunity. THE COURT: Mr. Moore if you feel that something is brought up during trial, you make the motion and I will rule on it. MR. MOORE: And, your Honor, during the deposition, I specifically stated the objection. THE COURT: Mr. Moore-- MR. MOORE: I stated the

cases from the Supreme Court, the most current case. THE COURT: Mr. Moore, nothing was brought before this Court for its consideration of that issue. MR. MOORE: Your Honor, the last time I was here, I raised that issue. THE COURT: And I think I probably told you, put it in writing and brief it. MR. MOORE: After my deposition, your Honor-- THE COURT: Again, Mr. Moore, I'll stand on the record, whatever is there. If you have an objection, you may make it during trial. And I'll tell both counsel at this time, when you make the objection stand. Make the objection, and go to the heart of the objection, I don't want a speech. Do I make myself understood? MR. MOORE: Well, can I put my objection on the record? THE COURT: You just did it. MR. MOORE: No, no I didn't put it completely. THE COURT: Go ahead, Mr. Moore: MR. MOORE: Because I want to state the Supreme Court of the United States and the Seventh Circuit, with respect to qualified immunity in 1983, okay, your Honor? The name of the case is William Jefferson Clinton-- THE COURT: Mr. Moore, let me stop you for a second. I am not going to hear argument on this right now. I have made my ruling. Now, if you want to file a brief as to why you think this Court was wrong. I have advised you and I will advise you again. During this trial, if there's something you object to you may so indicate it. When we have an instruction conference, Mr. Moore, I will also give you an opportunity to make your objections. MR. MOORE: Your Honor, first you told me I could state it. THE COURT: Mr. Moore, I didn't know if you were going to do something that was going to take a minute or two or if you were going to read from a brief that you apparently had. MR. MOORE: I am reading from the rules of the United States Supreme Court in (and) the Seventh Circuit, your Honor. THE COURT: Fine. You may do that with the Seventh Circuit afterwards, or you may do it during trial, if you find there is something that you want to bring to the attention of the Court. Right now, Mr. Moore, I have a jury downstairs. I do not intend to delay this trial. MR. MOORE: Well, your Honor, at this particular point, I think I should take an appeal to the Seventh Circuit with respect to the immunity question. THE COURT: Mr. Moore, I am not granting an interlocutory appeal for this. I am not going to grant that. If you wish to pursue this case. I am giving you an opportunity right now. MR. MOORE: Well, your Honor, that opportunity has expired. I will take the appeal to the Seventh Circuit. THE COURT: Are you indicating to me, Mr. Moore, that you are not going to proceed with today's trial? MR. MOORE: Correct. Based on the immunity question, your Honor. THE COURT: You're not going to present any witnesses? MR. MOORE: None. THE COURT: You're not going to present a witness list or a statement of the case? MR. MOORE: Your Honor-- THE COURT: Answer my question, Mr. Moore. MR. MOORE: Your, Honor. I cannot present to the Court the rule of law of the Supreme

Court of the United States, I cannot present to this Court the Seventh Circuit. THE COURT: Mr. Moore, again, I tried to explain to you in order for me to give you a setting, it is necessary for me to tell other people they can't have access to the Court. MR. MOORE: Your Honor-- THE COURT: Let me finish, Mr. Moore. That's why I gave notice. My criminal docket, Mr. Moore, has doubled in the last year. And they take precedent because of the Constitutional rights that they have. Civil cases are hard to get to trial. And I do everything that I can to get them to trial. I have a jury here. If somebody had called me and had an issue and had addressed it to me earlier, I might have been able to consider it. I looked at the motions that were outstanding and felt comfortable and still feel comfortable that we can proceed today. Now, Mr. Moore, you can proceed today. And if you have an issue that you feel so strong that this Court did the wrong thing, you have a right to go to the Seventh Circuit. I am not going to grant an interlocutory appeal. Do I make my self understood. MR. MOORE: Well, your Honor, I'm going to make myself now understood. You stated that this Court has rules. THE COURT: This Court what? MR. MOORE: This Court has rules. If I can't state to you the Supreme Court of the United States states with respect to immunity and qualified immunity and the rule of law with respect to it-- THE COURT: Mr. Moore, I gave you guys an opportunity to file whatever motions you want. I have also told you that during this trial, if you have an objection, you may state a pointed objection to whatever evidence is coming in. I also explained to you that I would give you an opportunity during the instructions, which are not in timely, to give me whatever objections you might have. And if you wish to file a brief by tomorrow, Mr. Moore, because this case is set for trial today, and I was told that it would be approximately a two-day trial. MR. MOORE: Well, your Honor, we have a disagreement over the rule of law with respect to qualified immunity, and the Supreme Court decision to that. THE COURT: Mr. Moore, again I am asking you, are you going to proceed to try your case today? If you do not, then I will dismiss your lawsuit. And I am going to order sanctions against you in the amount of the jury cost and possibly the legal cost. MR. MOORE: Your Honor, I'm going to rest. Everything I have to say with respect to this matter on the rule of law, as stated by the Supreme Court of the United States with respect to qualified immunity in 1983-- THE COURT: Are you going to proceed to present your case in this court today? MR. MOORE: No, your Honor. THE COURT: Are you going to present any evidence of any kind.? MR. MOORE: Your Honor-- THE COURT: Are you going to present any evidence of any kind? Your honor, I'm going to present to you the rule of law of the United States Supreme court with respect to qualified immunity in 1983. THE COURT: Mr. Moore, I will ask you again. Are you going to present any-- MR. MOORE: And I am asking you. I am asking

you. THE COURT Mr. Moore, one last time. are you going to present any evidence in the case at all? MR. MOORE: I am asking you. THE COURT: Mr. Moore. you are trying my patience. MR. MOORE: Let me appeal the issue to the United States-- I denied that already, Mr. Moore. MR. MOORE: --Seventh Circuit. THE COURT: I denied that already. Now, are you going to present any evidence in this case, understanding the possible consequences of not proceeding with your case? MR. MOORE: I understand the rile of law, your Honor. THE COURT: Are you going to present any evidence in this case? MR. MOORE: I am going to choose, your Honor. If I have the choice, it's going to be the Constitution of the United States and the decision of the Supreme Court of the United States and nothing else. . . . . .etc. THE COURT: Mr. Moore, are you going to present any evidence? Are you going to do anything to proceed with this trial today? MR. MOORE: Your Honor, may I state for the record-- THE COURT: Answer my question, Mr. Moore, and then I'll let you make a record, within reason. MR. MOORE: There is a case-- THE COURT: Mr. Moore, you're not answering my question. Are you going-- MR. MOORE: I cannot put on this record? THE COURT: Case dismissed. . . . . etc. " (Trans. 1/26/98, p. 29-37).

4. Order of the United States Court of Appeals For the Seventh Circuit, decided August 30, 1999, denying the petitioner's Petition for Rehearing; before the following: Honorable William J. Bauer, Circuit Judge; Honorable Joel M. Flaum, Circuit Judge; and Honorable Daniel A. Manion, Circuit Judge.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

August 30, 1999

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Joel M. Flaum, *Circuit Judge*
Hon. Daniel A. Manion, *Circuit Judge*

Circuit Court No. 98-1544

Michael Moore,
Plaintiff-Appellant

v.

Luis A. Molina, II, and
the City of East Chicago
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division

No. 96 C 264

Rudy Lozano. *Judge*

ORDER

ON August 17, 1999 the plaintiff-appellant filed a petition for rehearing. All of the judges on the original panel having voted to deny the petition,

IT IS ORDERED that the aforesaid petition for rehearing be and the same is hereby, DENIED.

5. At the conclusion of the court order deposition of the petitioner, on November 18, 1997, the following was stated with respect to delivery of the deposition to the petitioner:

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE, Plaintiff,	)	
v.	)	No.2:96-CV-264-RL
LUIS A. MOLINA, II, and CITY OF EAST CHICAGO, INDIANA, Defendants.	)	

The deposition of MICHAEL MOORE, taken at the instance of the defendants herein, pursuant to notice as to time and place and pursuant to the statutes of the State of Indiana, before Joyce A. Krukowski, CSR and Notary Public within and for the County of Lake, State of Indiana, at 9696 Gordon Drive, Highland, Indiana on the 18th day of November 1997, commencing at the hour of 1:00 o'clock in the afternoon.

. . . . . .

MR. DE BONIS: All right. I got no further questions. Now, as you're familiar with the rules so trial's on December 1st, you will want to read the transcript and sign it or do you want to waive your right to sign? MR. MOORE: I'm not waiving any rights I have under the law. MR. DE BONIS: Fine. I will-- how shall I deliver the transcript to you so you can read it? If I send the policeman over there, you'll sue us again. MR. MOORE: Why? MR. DE BONIS: It's been thrown in my face every time we've done it so far. If you had a phone--does Wallace Metals have a phone? No. I've told you. I have no telephone number listed on any court document filed. MR. DE BONIS: I understand that. Well, I will send a police officer to your address with an envelope containing the transcript of this deposition as soon as it's transcribed, and I'm asking the court reporter to transcribe it.

Now, Mr. Moore, you do not have telephone at your place of residence. You have indicated to me when we met in court last Friday, that the U.S. Mail does not properly deliver you mail, that it's often carried instead and put into a post office box of Wallace Metals contrary to your authorization, so that the mail to you is not reliable. I therefore have asked you today at the conclusion of this deposition whether you wish to waive your right or preserving your right of signature. I asked you whether I can deliver this deposition transcript to you via an East Chicago officer, who would be delivering it to your home. What is your reply? MR. MOORE: My specific reply to it? MR. DE BONIS: Will you authorized that or not? MR. MOORE: That the means of using the East Chicago Police Department-- MR. DE BONIS: I know its contrary to the constitution, but here's what I'm getting at please tell me how you want this delivered. to you then. MR. MOORE: And I do not authorize you, I cannot authorize you to use the East Chicago Police Department--MR. De BONIS: Who do you want to bring this to you? MR. MOORE: Let me finish--to intervene in the process of the United States District Court for the Northern District of Indiana. I cannot authorize that. MR. DE BONIS: Delivery of papers can be done by anyone. I'm just asking you, and I'm not going to do it because I'm not going to end up being a witness in my own case. Now, I'm going to tell you right now that unless you tell me, make arrangements for picking up the transcripts, I am going to deliver it to you by a police officer. He's going to do nothing but leave it at your place of residence, that's all he going to do. You won't cooperate in helping me get the documents to you, and frankly, I believe your argument that the Constitution forbids a sworn peace officer of the City of East Chicago to deliver papers to be without merit. or foundation, but that's for the judge to decide. Frankly, unless you tell me, I'm going to use that method because I found it to be reliable , and a police officer, being a sworn officer can make a return of service; and I can present

that officer's testimony in court to the fact that he did deliver it. Now if you don't like that, I'm willing to cooperate with you, but you have to help me. (OFF RECORD). MR. DE BONIS: That' what I'm going to do, okay? Now, whatever objection you have has been noted already. I will also state this for the record, we are going to trial December 1st. I expect you by that day to have read the transcript, prepare the errata sheet detailing whatever errors in the transcript you may find. And I think this young lady is very good., you'll find very few errors, and you will have to sign it as required by law. If you have not done that, then I'm going to reserve the right to call the court reporter to trial to corroborate the transcript, okay? That's what I intend to do please when you receive the transcript, read it in a timely fashion and prepare your signature page and errata sheet, get it to me and to the Court so it will be available for trial. MR. MOORE: Let the record reflect that in the United States of America we have the United States Postal Service; we have U.P.S.; we have Fed Ex, and they perform delivery services. They're not employed by our local municipality and that their actions are not limited by law. Did you hear what I said. MR. DE BONIS: No, and I don't want to hear it. Nothing I can do about it. You stated and objection, right? It's for the Court to decide." (Deposit. 11/1897, p. 87 through 92).

6. Transcript of proceedings before the District Court on November 14, 1997:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE, Plaintiff,	
	DOCKET NO: 2: 96-CV-264-RL
vs.	APPEAL NO: 98-1544
LUIS A. MOLINA, II, and the CITY OF EAST CHICAGO, INDIANA,	FRIDAY, NOVEMBER 14, 1997 9:30 A.M
Defendants.	PRETRIAL HEARING

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE RUDY LOZANO, JUDGE PRESIDING

"THE COURT: Etc. . . .Gentlemen, we're here today for a pretrial conference, I also indicated that would take up a discovery problem

that occurred. Mr. DeBonis, I don't want the defendants to think automatically that because the defendants don't cooperate with discovery, that they can come in at the last minute. these courts set settings because I have a full series of cases, and I'm having a hard time getting them set, and to ask me to come in and wipe all these settings off because the defendants did not do their job early on--having said that I am also very concerned with fairness in this case. And Mr. Moore, you have had this problem before. There was another case that you came to my court on and in fact, you eventually lost the case because you refuse to comply with discovery. Is that correct? MR. MOORE: That's correct. THE COURT: Now what seems to be the problem that we can't get these depositions set? MR. MOORE: I have a Motion to--for Sanctions. THE COURT: Answer my question. I'll get into the motion for sanctions later. MR. MOORE: The defendant's motion your Honor covers the problems that I encountered. THE COURT: Why don't you tell me what the problem is. Tell me what the problem is. MR. MOORE: It was the delivery mechanism that he chose to use. THE COURT: What was the delivery mechanism that he chose to use. Mr. MOORE: He chose to use the East Chicago Police Department to hand deliver the documents to me. THE Court; Did you receive notice? MR. MOORE: Hand delivered. THE COURT: Did you receive notice? Did you know the date and the time for a deposition? MR. MOORE: Yes, I did. THE COURT: Do you have any law that says it is improper to deliver notice by a Police Department? MR. MOORE: Your Honor, the most celebrated case in the history of the United states, McCulloch versus Maryland. THE COURT: Give me a citation and Counsel, I'll tell you right now, if I look that citation up and it's wrong, I may impose sanctions for it. I am not going to be doing the research for the attorneys. MR. MOORE: McCulloch verses Maryland, your Honor. THE COURT: Give me the citation first. MR. MOORE: I'll give you--do you use Lexis? THE COURT: We do. Lexis/nexis. Okay. The Supreme Court of the United States-- THE COURT: What is the citation? MR. MOORE: McCulloch verses State Maryland, 17 U.S. 316. THE COURT: What proposition do you take that case to stand for? MR. MOORE: That proposition stands for a state, a state--a state action cannot supersede a federal action. THE COURT: What does that have to do with giving notice to you for a deposition by a police officer? MR. MOORE: A police officer was not empowered by the Federal Rules of Discovery to make hand delivery. THE COURT: Gentlemen, I'm going to do this. When is this case set for trial? MR. DE BONIS: December 1st of 1997, I think, your Honor. THE COURT: I'm going to give you five days to give me a brief as to why this service wasn't proper. MR. MOORE: I have a motion here. THE COURT: I'll let you file your motion. THE COURT: I'm going to give you three days to respond, okay? In the mean time, I'm going to

tell you now, I'm going to order the deposition. Now, we can pick a date right now or I'll go out and pick it out of the air and nobody will be happy. MR. MOORE: Okay, your Honor. Now, there is one more problem. THE COURT: Let me get this deposition straightened out. I'll give a date right now. Gentlemen, why don't you look at your calendars or get your phone calls and get that straightened out. Do it this week. Are you available? You can't do it this week, it is Friday. How about Monday or Tuesday? MR. DE BONIS: We can find time to do that., your Honor. MR. MOORE: I can tell you what the other problem is. MR. MOORE: With respect to this deposition, another case that we have is William Jefferson Clinton verses Paula Corbin. This set forth the discovery rules when qualified immunity is raised. THE COURT: Counsel, until your deposition is taken, you don't even know what questions they're going to ask. MR. MOORE: In this case all discovery ceased when the immunity was raised. THE COURT: Counsel, I'll tell you what. I'm going to take a chance, okay? I'm going to order the depositions. If you want to appeal it, you may. I don't think that applies in this case. And I'm going to order that a deposition be taken. Now, give me a choice, Monday or Tuesday. MR. MOORE: Can I read the case. THE COURT: No you cannot read. I made an order, Counsel. My tolerance, Counsel, with people avoiding discovery is very low. And this has happened before, and I'm telling you now I'm ordering it. MR. MOORE: I'm not avoiding discovery. THE COURT: Can you do it on Monday or Tuesday? I've ordered that a deposition be taken. MR. MOORE: You've ordered that a deposition be taken? THE COURT: Yes, I'm ordering it. MR. MOORE: May I make a motion. THE COURT: Tell me what date you'll be present for a deposition. I'm giving you a choice, Counsel. I intend to try this case on the date that it is scheduled. MR. MOORE: You haven't listened to the law. THE COURT: Conusel I know what the law is. If you want to appeal it and you think I'm wrong, go to the Court of Appeals. I'm telling you now I do not want to delay this case. We are going to take this deposition,Counsel. MR. MOORE: Would you let me state for the record what the Supreme Court says about discovery and qualified immunity? At least the case-- THE COURT: Counsel if you want to file a brief and give it to me by Monday. I'll take a look at it. And if I change my mind, I'll stop the deposition. But I'll schedule it now for Tuesday, okay? MR. MOORE: Would you let me cite what the case is? THE COURT: You can cite the case. Go ahead. MR. MOORE: Okay. This is the most recent case, your Honor. It's William Jefferson Clinton versus Paula Corbin, Number 95-1853. THE COURT: What does that case stand for? MR. MOORE: Immunity, your Honor. THE COURT: Tell me more than key words. What about immunity in your case? MR. MOORE: Paula Corbin brought a suit against the President of the United States and discovery was prohibited

against the President of the United States and discovery was prohibited until the immunity question was settled. THE COURT: Counsel, is that because this was the President of the United States? MR. MOORE: No, it is not because it is the President of the United States. THE COURT: Counsel, you've cited your case, you've cited your reasons. Counsel, I control this hearing. I'm ordering a deposition Tuesday. What time, Mr. DeBonis? MR. DE BONIS: Your Honor, may it please the Court, I have two things schedule on Tuesday. I would be glad to have my associate enter his appearance in this case and oppose Mr. Moore so we can do it any time on Tuesday. THE COURT: Mr. Moore, what is your schedule on Tuesday? What is your preference? MR. MOORE: I have to follow your order, your Honor. THE COURT: 10:00. Failure to appear-- MR. MOORE: Now, your Honor-- THE COURT: Just quit and listen. Failure to appear may result in sanctions and even the possibility of a dismissal of this lawsuit. So it is imperative that counsel appear. Mr. Moore, if you want to give me something by Monday during the morning so that I have time to read it, I'll be glad to read it. MR. MOORE: Your Honor, I have it here. THE COURT: Listen to me, please, and quit interrupting. Based upon the law as I know it now, what you have indicated is not the law. I'll be happy to look at it and read that case. But your finding that all cases of immunity stops discovery just isn't so. I have seen too many cases of immunity and discovery goes on. MR. MOORE: Can I just state this one last law? THE COURT: No, you're--we are not going to argue it. I gave you an opportunity to brief it to me. MR. MOORE: Can I just state-- THE COURT: No, no, this is not an argument stage. Now, Mr. De Bonis, having said that, I'm not necessarily going to extend al these deadlines. (Trans. of Proc. 11/14/97, p. 2-9).

7. Defendant's motion to grant relief from order controlling trial or in the alternative to dismiss, filed November 12, 1997:

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE, Plaintiff,	)	
v.	)	No.2:96-CV-264-RL
LUIS A. MOLINA, II, and CITY OF EAST CHICAGO, INDIANA, Defendants.	)	(Filed November 12, 1997)

MOTION TO GRANT RELIEF FROM ORDER CONTROLLING TRIAL, OR IN THE ALTERNATIVE TO DISMISS

Defendants City of East Chicago, Indiana and Luis A. Molina III, by counsel Smith & DeBonis, Jr., moves the Court for an Order pursuant to Rule 16 of the Federal Rules of Civil Procedure granting relief from this Court's prior Order after preliminary Pre-Trial Conference and Trial entered on December 31, 1996, and in support thereof shows the Court that: 1. On December 30, 1996. plaintiff Michael Moore, pro se, appeared with undersigned counsel for the defendants for preliminary Pre-Trial Conference during which the Court entered Orders setting discovery deadline for June 13, 1997, dispositive motions deadline for July 4, 1997, and setting Pre-Trial Conference for November 14, 1997 at 9;30 a.m. Trial was scheduled for December 1, 1997, at 8:30 a.m.

2. On December 31, the Court entered its Order Controlling Final Pe-Trial Conference and Trial requiring, among other things, that counsel for the parties in the absence of Court were to meet not less than ten days before the Final Pre-Trial conference for the purpose of drafting the former Pre-Trial Order and that the Pre-Trial Order was to be delivered to Court not later than five (5) business days before the final Pre-Trial Conference scheduled for November 14. Such PreTrial Order, accordingly would have been due on November 7, 1997.

3. On or about June 5, 1997, undersigned counsel caused a letter to be delivered to plaintiff Michael Moore at his address at 1202 East Chicago Avenue, East Chicago, Indiana by hand-delivery through an East Chicago policeman as well as by U.S. Mail transmitting a notice of deposition for his testimony to be taken in undersigned counsel's law offices on June 10, 1997 at 10:00 at 10:00 a.m. The mailed copy of this notice was not returned as undelivered, and the East Chicago police officer duly left the notice at said address with a person of suitable age and discretion. Mr. Moore did not appear for deposition on June 10, 1997. A true, accurate and complete copy of the record made with the court reporter on that date including the letter and notice of deposition referred to above is attached as Exhibit "A".

4. Undersigned counsel re-noticed the deposition for June 30, 1997, this time providing notice by certified mail return receipt requested. Said second notice of deposition was mailed on the 19th day of June, 1997. Return receipt was received, signed by an individual other the Michael Moore at this address. Again, on June 30, Mr. Moore failed to appear. The record made by the stenographic reporter with attached receipt for certified mail and second notice of deposition together with the return receipt showing delivery is attached hereto and made a part hereto as Exhibit "B".

5. Mr. Moore has no telephone so it has been impossible for undersigned counsel to get in touch with him other than through letters.

6. On June 24, 1997, this court entered it Order granting defendant's Motions to Dismiss plaintiff's claims arising on August 15, 1994. The only claim remaining is a claim for an alleged illegal stop and search on July 8, 1995 which the court noted was not time barred.

7. Pursuant to this Court's Order, undersigned counsel attempted to get in touch with Mr. Moore by sending him a letter, again hand delivered by a member of the East Chicago police department, Detective Bork, informing him of the court's requirement that he participate in the preparation of the Pre-Trial Order. Said letter was delivered by the detective on October 30 requesting a meting with Mr. Moore early during the week of November 3, 1997. Mr. Moore did not respond to the letter nor did he call or in any other way communicate with undersigned counsel. A true, accurate and complete copy of the letter and the officer's return of service is attached hereto and made a part hereof as Exhibit "C".

8. As a result of the plaintiff's failure to cooperate with discovery and with preparation of the Pre-Trial Order a meaningful Pre-Trial Order cannot be prepared as required by the Court's prior orders.

9. Undersigned counsel request the court to grant relief from that Order to the extent of an Order requiring Mr. Moore to appear before the Court for the purpose of participating meaningly in discovery and pre-trial proceedings or, in the alternative, finding him in violation of this court's prior orders and dismissing his remaining claim. Further, pending such proceedings, reschedule Pre-Trial Conference and trial accordingly.

Wherefore, undersign counsel urges the Court to grant this motion and to enter its order consistent herewith. (Def. Mot. to Grant Relief from Ord. Cont. Trial or in the Altern. to Dismiss, 11/12/97, p. 1-4).

8. DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO STRIKE PLAINTIFF'S MOTION FOR SANCTIONS AND ENTRY OF DEFAULT. (Filed 11/18/97).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE,	)	
Plaintiff,	)	
v.	)	No.2:96-CV-264-RL
LUIS A. MOLINA, II, and	)	(Filed November 18, 1997)
CITY OF EAST CHICAGO,	)	
INDIANA,	)	
Defendants	)	

MOTION TO STRIKE PLAINTIFF'S MOTION FOR SANCTIONS AND ENTRY OF DEFAULT

Introduction

In his Motion for Sanctions and Entry of Default, the plaintiff accuses the defendants and their counsel of willfully and wantonly interfering with the law in its regular course of administration" and "violating the constitutional right of the plaintiff to pursue a cause of action under section 1983 of the Civil Rights free (sic) from intimidation and coercion by police officers of the East Chicago, (Sic) Police Department and Attorney Anthony De Bonis, Jr." (Plaintiff's Motion). In response, the defendants assert that the plaintiff's claim is meritless and the Court should strike the Motion.

Argument

According to the plaintiff, defendants are guilty of doing the following: 1. Serving "via hand delivery by officer Rivera (Badge No. 3480, a police officer in the employment of the East Chicago Police department, while dressed in a policeman's uniform and driving a police vehicle of the City of East Chicago, Indiana, (a) notice a deposition and an accompanying letter from the defendants attorney of record." (Plaintiff's Aff., ¶ 5): 2. Mailing "via certified mail by delivery to a number post office box (Box No. 118), a second notice of deposition. . . . "(Plaintiff's Aff., ¶ 7); 3. Apparently conspiring to have two East Chicago police officer break down his door and harass him under the ruse of answering a burglar alarm. (Plaintiff's Motion, ¶ 8; and 4. Having an East Chicago Police Detective deliver a letter from defendant's counsel to the plaintiff. (Plaintiff's Aff., ¶ 9).

First, defendants turn to their use of East Chicago Police Officers and certified mail to deliver documents to the plaintiff. According to the plaintiff, East Chicago police "had no lawful authority to hand deliver any letter to the plaintiff from the defendants with respect to proceedings before the District Court. (Plaintiff's Memo. of first unnumbered page.). Plaintiff's argument takes an exceptionally strict interpretation of the Federal Rules of Civil Procedure and concludes that since "(t)here are no provisions within the (FRPC) to allow a police officer employed by a municipality to intervene arbitrary (sic) in the process of a civil action in the District Court. Such arbitrary action, the hand delivering by a police officer employed by a municipality of the State of Indiana, is directly contrary to the Constitution and the decision of the Supreme Court in McCulloch v. Maryland." (Plaintiff's Memo. at the second unnumbered page). Plaintiff's claim, is without merit.

Consider Federal Rule of Civil Procedure 5(a). It provides a laundry list of papers that must be served upon the parties in a lawsuit. Federal Rule 5(b) provides that "service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or mailing it to

the attorney or party at the attorney's last known address. . . ." Clearly, the Federal Rules would not specifically provide that a police officer employed by a municipality of the State of Indiana may or may not make delivery. In fact, the Rules are completely silent on the issue of who may deliver papers to another party under Rule 5. In the absence of any Federal Rules guidance, the defendants had to use what they felt was the most effective way in which to reach the plaintiff.

Putting aside the absurdity of someone being "intimidated" by having a police officer hand him a piece of paper, the defendants simply have not violated Rule 5 by using members of the East Chicago Police Department to deliver documents to the plaintiff. Plaintiff does not have a telephone. Regular mail frequently does not find him. The only way the defendants could be sure that plaintiff received the documents is to hand deliver them or use certified mail. To do this, the defendants needed a responsible party to make sure that the plaintiff received the documents. Defendant's counsel is far to busy to do this himself, so the East Chicago Police Department or certified mail were obvious alternatives. Nothing in the Federal Rules expressly or impliedly forbids what defendants have done. Thus, plaintiff's motion for sanctions and default against the defendants and their counsel is completely frivolous and should be stricken.

Next, by including in his affidavit a claim that two East Chicago Police officers entered into his dwelling, the plaintiff implies that the defendants were behind it. Assume, arguendo, that two East Chicago Police Officers, in fact, entered into his dwelling in response to a burglar alarm that had sounded in the business underneath the plaintiff's home. Plaintiff offers no evidence whatsoever, not even a clear allegation, that connects the defendants to the entry into his dwelling. Thus it is nothing more than a meritless and pernicious suggestion designed to jaundice the defendants in the Court's eyes.

Conclusion

Therefore, in summary, because the plaintiff's Motion for Sanctions and Default Judgment is completely frivolous, defendants respectfully request that the Court strike the Motion.

9. Petitioner's affidavit attached to a motion in response to motion to set aside default, with respect to the facts and circumstances surrounding the unlawful stop and search of the petitioner on July 8, 1995, stated in the petitioner's complaint as Number (x).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE,	)	
Plaintiff,	)	
v.	)	No.2:96-CV-264-RL
LUIS A. MOLINA, II, and	)	(Filed October 25, 1996)
CITY OF EAST CHICAGO,	)	
INDIANA,	)	
Defendants.	)	

RESPONSE TO DEFENDANT'S MOTION TO SET ASIDE DEFAULT

. . . . . .

Part II. With respect to the affiant on July 8, 1995, (p. 3, number (x) of the plaintiff's complaint).

1. That Saturday July 8, 1995, was a warm, sunny and clear day in Northwest Indiana, the kind of day that a person would not wear a coat or jacket, with the temperature in the 80's.
2. That morning the affiant left home with a manila envelope, containing documents from the United States District court for the Northern District of Indiana, Hammond, Division, a legal pad to write notes, and no jacket or coat.
3. The affiant used the Tri-City Bus of the Gary Transpiration District, to ride to the Gary Metro Center, to transfer to a local Gary bus, which would take the affiant to the campus O Indiana University Northwest; to work in the law section of the University's Library from 10 a.m. to 5;00 p.m. , on a matter that was at that was at that time, (before the) sic, the United States District Court, for the Northern District of Indiana, Hammond Division.
4. The affiant worked in the library until 5:00 p.m. ,closing time on Saturdays, reading cases and xeroxing cases from the following: (1) The Supreme Court of the United States; (2) The United States Court of Appeals for the Seventh Circuit; and (3) The United states District Court for Indiana.
5. That after leaving the library the affiant went to the Gleason Park Golf Club Restaurant, which is directly across the street from the campus of Indian University Northwest, to the west.
6. After leaving the golf restaurant, the affiant (sic). went to have dinner on 25th Street between Jefferson and Adams' Street in Gary, Indiana.
7. After having dinner, the affiant stopped to see an automobile salesman that the affiant had (sic) know for 34 years living in the 2300 block of Connecticut Street in Gary, Indiana.
8. After some conversation with the automobile salesman, the affiant proceed to the Gary Metro Center in downtown Gary, Indiana; to ride the South Shore Train to East Chicago, Indiana.
9. After departing the South Shore Train in East Chicago, Indiana, the

affiant proceed to Chicago Avenue, from the train station on Indianapolis Blvd..
10. While on Chicago Ave., the affiant stopped by one of the night places for about ten or fifteen minutes, and then proceed towards home on Chicago Avenue.
11. The affiant was stopped and searched by Luis Molina, II, next to the parking lot of the Gannon Company, in the 400 Block of Chicago Ave., while the affiant was walking with the manila envelope with documents from the United States District Courts, Northern District of Indiana, Hammond Division, and the xerox copies; (1) Supreme Court decisions of the United States, (2) decisions of the United States court of Appeals for the Seventh Circuit, (3) decisions of the United States District Court for Indiana; and (4) the legal pad with notes (i.e., Legally protected information by rule of Law under the attorney client work product privilege).
12. That the defendant Luis A. Molina, neither identified himself as a police officer with any identification whatsoever, or was dressed in the uniform of an East Chicago police officer, or was the defendant driving an East Chicago police car, also the defendant had another East Chicago police officer in the vehicle with him.

10. MEMORANDUM OF LAW by petitioner/appellant/plaintiff in support of motion to reconsider order dismissing petitioner's claims. (2/6/98).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE, Plaintiff,	)	
v.	)	No.2:96-CV-264-RL
LUIS A. MOLINA, II, and CITY OF EAST CHICAGO, INDIANA, Defendants	)	(Filed February 6, 1998)

. . . . . .

MEMORANDUM OF LAW

ISSUE

Whether the defense of qualified immunity should be decided by the District Court prior to selecting a jury for trial.

FACTS

The plaintiff filed a complaint under 42 U.S.C. § 1983, on August 16, 1996. The defendants filed an answer on September 19, 1996, asserting among other defenses, "THIRD AFFIRMATIVE DEFENSE: Officer Molina is entitled to qualified immunity from liability on the grounds that he took action based on the reasonably objective belief that his conduct was in conformance with law." The defendants filed neither a motion for dismissal or a memorandum of law in support of the legal defense of qualified immunity. On September 19, 1996, the defendants filed a "Consent to Jurisdiction by United States Magistrate Judge," the plaintiff did not file a "Consent to Jurisdiction by United States Magistrate Judge." On December 30, 1996, the Honorable Theresa L. Springmann, Magistrate Judge, conducted an initial pretrial conference, and filed a Memorandum which stated the following: " Notwithstanding the pending motions, the parties are to proceed with discovery in the case and fully cooperate with the other side in scheduling discovery. Plaintiff Moore will make himself available for deposition anytime after April 1, 1997. Defendants advise that they will be submitting written interrogatories to the plaintiff for response in the near future. Plaintiff is advised that he will be required to respond to discovery request, including interrogatories, within thirty (30) days, all in accordance with the Federal Rules of Civil Procedure.

The parties are to complete all discovery in the case no later than June 13, 1997 . . . etc."

On June 24,1997, the District Court entered an Order denying the plaintiff's Application for Default Judgment, and granting defendant Molina's Motion to Set Aside Clerk's Entry of Default, and Motion to Dismiss with respect to plaintiff' claims arising on August 15, 1994. The order of the District Court neither addressed or resolved the issue of immunity raised by the answer of defendant Molina. At the pretrial conference on November 14, 1997, the issue of immunity with respect to discovery was raised by the plaintiff for which the District Court ordered the plaintiff to be present for a deposition on November 18, 1997 at the law offices of Mr. Debonis, prior to the District Court's determination of the issue of immunity. On November 18, 1997 the plaintiff appeared as ordered by the District Court at the law offices of Mr. Debonis and clearly stated on the record his objection to taking the deposition. The plaintiff clearly stated the rule of law with respect to discovery and immunity as stated by the United States Circuit Court of Appeals for the Seventh Circuit, and the Supreme Court of the United States. In addition to stating the law, the decisions of the respective Courts were offered by the plaintiff to Mr. DeBonis for his review. Mr. DeBonis offered no decision either from the Circuit Court of Appeals or the Supreme Court to substantiate the taking of the plaintiff's deposition prior to the District Courts determination of the immunity issue.

On January 22, 1998 after reviewing some of the documents that had been filed with the court for preparation of trial, Mr. DeBonis call the office of United States District Judge Rudy Lozano, to confirm the trial date of January 26, 1998, for which he was informed that date January 26, 1998, was not the actual Trial date but the case would be place on the secondary civil setting. After learning of the secondary setting, Mr. Debonis and the plaintiff reviewed no more documents for preparation of the trial. Mr. DeBonis requested that the plaintiff call him at 5:00 p.m. after he return from the District Court to the confirm the trial date, how the plaintiff was working in preparation for another endeavor an unable to telephone Mr. Debonis at 5:00 p.m. On January 23, 1998, in the mid morning Mr. Debonis informed the plaintiff that the trial was set for January 26, 1998, at 8:30 a.m. On January 26, 1998, the plaintiff appeared in the courtroom of the Honorable Rudy Lozano, Judge United States District Court, after 9:00 a.m. The Court informed the plaintiff that no continuance would be granted and that the trial would go ahead as scheduled. When the issue of qualified immunity for the defendant was raised, the plaintiff requested leave of court to appeal to the Circuit Court of Appeals for the Seventh Circuit the decision of the court with respect to immunity. The request was denied, and the plaintiff refused to proceed any further with the proceedings, thereupon the Court dismissed the plaintiff's claims and assessed jury costs.

LAW

In the case William Jefferson Clinton v. Paula Corbin 117 S.Ct 1636, 1997 U.S. Lexis 3254, 137 L. Ed. 2d 945; no discovery was allowed until the Supreme Court ruled on the immunity issue (i.e. Footnote 7. "Although, as noted above, the District Court's initial order permitted discovery to go forward, the court later stayed discovery pending the outcome of the appeals on the immunity issue. 879 F. Supp. (ED Ark. 1995)" page 37 of LEXSEE.

In Harlow v, Fitzgerald 457 US 800, 73 L Ed 2d 396, 102 S Ct 2727; the Supreme Court Stated: "Consistently with the balance at which we aimed in Butz, we conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery, We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable persons would have known." 73 L Ed 2d 410. The Supreme Court further stated: "Until this threshold immunity question is resolved, discovery should not be allowed." Id at 411.

In Rakovich v. Wade 850 F.2d 1180 (7th Cir.1988), the Circuit

Court of Appeals for the Seventh Circuit stated: " The entitlement (to qualified immunity) is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. " Id. at 1206. The case further states in footnote 19: "Justice Stevens . . . . . The rule of the Harlow case, in contrast, focuses on the character of the plainitff's legal claim . . . Consistently with this overriding concern to avoid the "litigation of subjective good faith of government officials, (citations omitted) Harlow does not allow discovery until the issue of whether the official's alleged conduct violated a clearly established constitutional right has been clearly determined on a motion for summary judgment. Anderson, 107 S. Ct. at 3045.

CONCLUSION

It should be abundantly clear from the above decisions that the issue of qualified immunity should be resolved prior to trial. Therefore, the pro se plaintiff moves this Honorable Court to Reconsider its Order to dismiss the plaintiff's claims and the assessment of jury costs.

11. Motion by petitioner for Sanctions and Entry of Default, Affidavit and supporting Memorandum of Law. (11/14/97).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

MICHAEL MOORE, Plaintiff,	)	
v.	)	No. 2:96-CV-264-RL
LUIS A. MOLINA, II, et al. Defendants,	)	

MOTION FOR SANCTIONS AND ENTRY OF DEFAULT

Comes now plaintiff, Michael Moore, pro se, and moves this Honorable Court for an entry of a judgment by default against defendants Luis A. Mollina, II, and the City of East Chicago, Indiana and sanctions against attorney Anthony De Bonis, Jr.; for willfully and wantonly interfering with the law in its regular course of administration in the United States District Court for the Northern District of Indiana; and violating the constitutional right of the plaintiff to pursue a cause of action under section 1983 of the Civil Rights free from intimidation and

coercion by police officers of the East Chicago, Police Department and Attorney Anthony De Bonis ,Jr. In support of the above motion , the plaintiff attaches incorporates, and makes the following affidavit and memorandum of law.

STATE OF INDIANA)
) SS
COUNTY OF LAKE)

AFFIDAVIT

Comes now Michael Moore, pro se, and upon his oath deposes and says, UNDER PENALTIES FOR PERJURY, the following:

1. That on August 16, 1996, the affiant filed a verified complaint in the United States District Court for the Northern District of Indiana, Hammond Division, against the following named defendants; Luis A. Mollina, II, and the City of East Chicago, Indiana.
2. At this point the affiant incorporates by reference (v) through and including (x) of the affiant's complaint, i.e. "The following are the specific constitutional grounds which form the basis of the 42 U.S.C. section 1983, cause of action.
3. That on September 19, 1996, the defendants filed their Answer and Affirmative Defenses.
4. That the third affirmative defense asserted by officer Molina, was that of a qualified immunity from liability.
5. That on or about June 5, 1997, or soon thereafter the plaintiff received via hand delivery by officer Rivera (Badge No.348), a police officer in the employment of the East Chicago Police De-partment, while dressed in a policeman's uniform and driving a police vehicle of the City of East Chicago, Indiana, received a notice of deposition and an accompanying letter from the defendants attorney of record.
6. That attached and incorporated into this affidavit are true and complete copies of the envelope, notice of deposition and accompanying letter stated in No. 5. above, as Exhibit No. 1.
7. That on or about June 13, 1997 the affiant received via certified mail by delivery to a numbered post office box (Box No. 118), a second notice of deposition, for which true and complete copies are now attached an incorporated by reference as Exhibit No. 2.
8. That on or about October 17, 1997, sometime before 10.00 p.m. an alarm in the business down stairs from the personal residence of the affiant sounded, as it has on many previous occasions for which the East Chicago police responded after the alarm had ceased, as they have on many previous occasions. After arriving after the alarm had sounded, one of the policeman force open the locked door to the

personal residence of the affiant, and two police officers entered the building, and proceeded to come upstairs to the living area of the affiant, one was of Hispanic descent, the other was of African American descent (who's name is officer A. Taylor Badge No. 399). When stopped before entering the study of the affiant, where the affiant was diligently during legal research, the affiant asked the officers if they had a warrant, after the second request for a warrant by the affiant, officer A. Taylor brought his arm and hand up to about the level of his hearth, with a service weapon in his right hand and told the affiant "This is my warrant". Subsequent to showing the affiant the service weapon officer A. Taylor flash a flashlight directly in the affiant's eyes, for which he was specifically told by the affiant not to flash the flashlight in the affiant's eyes. Officer A. Taylor's response to the affiant was to threaten to take the affiant to jail if the affiant did not shut up. The police officer of Hispanic descent was polite and courteous from the time the affiant first spoke with him, and requested the affiant to come down stairs to see how some person had force open the door, for which the affiant did go and see how some police officer had force his door open that was locked.

9. That on or about October 31, 1997 the affiant received hand delivered from a detective of the East Chicago Police Department, a letter dated October 30, 1997 for which a true a true and complete copy is attached, incorporated and made a part of this affidavit as Exhibit No. 3.

Further, Affiant sayeth not,

/s/ Michael Moore
Affiant, Michael Moore
November 14, 1997

MEMORANDUM OF LAW

ISSUE

1. Whether the police had lawful authority under the constitution to hand deliver to the pro se plaintiff the letter for notice of deposition or the letter with reference to the pre-trial order.

ANALYSIS

"The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law." Monoroe v Pape, 365 US at 184, 5 L Ed 2d 492, 81 S Ct 473 (quoting United States v Classic 313 US 299 326, 85 L Ed 1368, 61 S Ct 1031 (1941)). By creating an expressed federal remedy, Congress sought to "enforce provisions of the Fourteenth

Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." Monroe v Pape, supra, at 172, 5 L Ed 2d 482, 81 S Ct 473.

It is the argument of the plaintiff that the East Chicago police had no lawful authority to hand deliver any letter to the plaintiff from the defendants with respect to proceedings before the District Court, under the following:

(1) The Constitution of the United States

(2) The Federal Rules of Civil Procedure, a legislative act of the United States Congress.

(3) The landmark decision of the Supreme Court of the United States of America:

McCulloch v. The State of Maryland et al., 4 Wheat 316, 4 L Ed 579 (1819)

The United States Constitution Article VI, paragraph two states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . . . shall be the supreme Law of the Land; . . . . . etc."

Mr. Chief Justice John Marshall of the Supreme Court, stated in the landmark decision of Marbury v. Madison, 1 Cranch 137, 2 L Ed 60 (1803), the following:

" It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior or paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts is alterable when the legislature shall please.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are an absurd attempt on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be an act of the legislature, repugnant to the constitution is void.

. . . . . .

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and the courts as well as other departments are bound by that instrument."

Chief Justice Marshall further stated in Cohens v. Virginia, 6 Wheat 284, 285 the following:

"if it could be doubted, whether from its nature, it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that "this constitution, and the laws of the United States, which shall be made in pursuance thereto, and all treaties made, or which shall be made, under the authority of the United States,

shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding."

This is the authoritative language of the American people; and if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution, and if there be any who deny its necessity, none can deny its authority.' Id at 285.

In McCulloch v Maryland et al., 4 Wheat 316 4 L Ed 579 (1819), a land mark decision of the Supreme Court, Chief Justice Marshall stated the following:

"But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and state governments must be brought into view, and the supremacy of their respective laws, when they are in opposition must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this-that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subject on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, "this Constitution, and the laws of the United States, which shall be made in pursuance thereof," shall be the supreme law of the land." . . . . . etc.

The government of the United States, then though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any state to the contrary notwithstanding." Id. at 601 . . . . . There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution is so intermixed with the materials which compose it, so blended with its texture, as to be incapable of being separated from it without rendering it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them. Id at 606

. . . . . .

The sovereignty of a state extends to everything which exist by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution-powers conferred on that body by the people of the United States? We think it demonstrable that that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer sovereignty which will extend over them." Id 607

From the above three decisions of the Supreme Court by Chief Justice John Marshall it should be abundantly clear that the "constitution and the laws made in pursuance thereof, are the supreme law of the land. Therefore, given the Constitution Article VI, paragraph two and the above decisions of the Supreme Court, the Federal Rules of Civil Procedure, a legislative enactment into law of rules of procedure in the District Courts of the United States, is the supreme law of the land. There are no provisions within the Federal Rules of Civil

Procedure to allow a police officer, employed by a municipality in a state, to intervene arbitrary in the process of a civil action in the District Court. Such arbitrary action, the hand delivering by a police officer employed by a municipality of the State of Indiana, is directly contrary to the Constitution and the decision of the Supreme Court in McCulloch v Maryland, supra above.

Furthermore said conduct by the police officers should be view legally, in addition to unlawful arbitrary conduct, as intimidation and coercion against the plaintiff for exercising his constitutional right to bring a cause of action against another police officer for misuse of power, possessed by virtue of state law, and made possible only because the wrongdoer is clothed with authority of state law.

CONCLUSION

Therefore, Michael Moore, moves this Honorable Court for sanctions against Attorney Anthony Debonis, and for entry of judgment against defendants Luis A. Molina, II, and the City of East Chicago, Indiana for deliberately violating "This great principle, is that the Constitution and the laws made in pursuance thereof are supreme, that they control the constitution and laws of the respective states, and cannot be controlled by them. Supra at 606; and deliberately violating the constitutional right of the pro se plaintiff to bring a cause of action by intimidation and coercion; and any other relief this Honorable Court deems just, necessary and appropriate.